12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No [redacted] 430

BRIDGET McGOVERN, ADMINISTRATRIX OF ESTATE OF PETER McGOVERN, DECEASED,
PLAINTIFF IN ERROR,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED APR 2 - 1914

(24144)

( )

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No.

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Plaintiff in Error,

v.

PHILADELPHIA AND READING RAILWAY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Page.
Transcript from the District Court of the United States for the Eastern District of Pennsylvania	1
Docket Entries	1
Writ of Error	3
Statement of Claim	4
Plea	6
Bill of Exceptions	6
Evidence for Plaintiff	7
Testimony of Bridget McGovern	7
Testimony of John McGoldrick	16
Testimony of John McGovern	21
Testimony of Bridget McGovern (Re-called)	25
Testimony of Antonio Parento	26
Testimony of Domenico Di Massenio	35
Testimony of Philip Cantando	42
Plaintiff Rests	46
Motion for Nonsuit	46
Motion for Nonsuit Refused	46
Evidence for Defendant	46

INDEX.—Continued.

	Page.
Testimony of Wesley Alpaugh	46
Testimony of Albert Dumpkey	49
Testimony of John Bradley	51
Testimony of Joseph Derharner	56
Testimony of John J. Leddy	60
Testimony of John H. Drummehler	65
Testimony of Harry N. Dickinson	71
Testimony of Edward F. Harrison	73
Further Evidence on Behalf of Plaintiff	74
Testimony of C. H. Corson	74
Further Evidence on Behalf of Defendant	77
Testimony of Bridget McGovern	77
Defendant Rests	78
Testimony Closed	78
Charge of the Court	78
Defendant's Requests	78
Verdict	80
Judge's Certificate to Bill of Exceptions	80
Opinion of Trial Judge Upon Defendant's Motion for New Trial and for Judgment N. O. V. After First Trial	80
New Trial Ordered	84
Motion Filed by Plaintiff Waiving a New Trial, etc.	84
Motion Refused	84
Exception	84
Praecipe for Judgment	85
Judgment	85
Certificate by Trial Judge as to Jurisdictional Question	85
Assignments of Error	86
Petition for Writ of Error	88
Order Allowing Writ of Error	90
Clerk's Certificate	90

DOCKET ENTRIES.

Docket 2580. June Sessions, 1913.

George Demming.

Bridget McGovern, Administratrix of the Estate of Peter McGovern, deceased,

v.

Wm. Clarke Mason.

Philadelphia and Reading Railway Company, a corporation.

Trespass.

1913	June	11. Praecipe for summons filed. Summons exit returnable the first Monday of July next.
		16. Statement of claim filed. Rule to plead filed.
		26. Order for the appearance of Wm. Clarke Mason, Esq., for defendant, filed.
	July	7. Summons returned "served" and filed.
		14. Plea filed.
	August	19. Order to place case on trial list filed.
	September	23. Order to place case on trial list filed.
		26. Stipulation as to certain evidence filed.
	November	10. Jury called.
		11. Verdict for the plaintiff, viz., for Patriek McGovern, $350; for Bridget McGovern, $350.
		13. Defendant's motion and reasons for new trial filed. Defendant's motion for judgment non obstante veredicto filed.
		14. Plaintiff's Bill of Costs filed.
1914	January	7. Opinion, Thompson, J., overruling defendant's motion for judgment non obstante veredicto and granting new trial filed.
		23. Motion of plaintiff for entry of judgment in favor of defendant filed. Order refusing plaintiff's motion for entry of judgment in favor of defendant and granting exception thereto to plaintiff filed.

February	9.	Jury called. Verdict for defendant by direction of the court.
	19.	Bill of Exceptions filed.
	24.	Praecipe for judgment filed. Judgment accordingly. Judgment filed.
	25.	Petition for writ of error filed. Assignments of error filed. Order allowing writ of error filed. Certificate of jurisdiction filed.
March	17.	Bond sur writ of error to U. S. Supreme Court and order of approval filed.
	18.	Writ of error allowed and copy thereof lodged in clerk's office for adverse party. Citation allowed and issued.
	20.	Defendant's Bill of Costs filed. Citation returned "service accepted" and filed.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Bridget McGovern, administratrix of the estate of Peter McGovern, deceased, plaintiff, and Philadelphia and Reading Railway Company, defendant, No. 2580, June Session, 1913, a manifest error hath happened, to the great damage of the said Bridget McGovern, administratrix of the estate of Peter McGovern, deceased, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the eighteenth day of March, in the year of our Lord one thousand nine hundred and fourteen.

(Seal)

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before THOMPSON, J.

Allowed,
BY THE COURT.

Attest,
GEORGE BRODBECK,
Deputy Clerk.

March 18, 1914.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

June Sessions, 1913. No. 2580.

Bridget McGovern, Administratrix of the Estate of Peter McGovern, Deceased,

v.

Philadelphia and Reading Railway Company, a Corporation Incorporated under the Laws of the State of Pennsylvania.

PLAINTIFF'S STATEMENT OF CLAIM.

(Filed June 16, 1913.)

The plaintiff, Bridget McGovern, administratrix of the estate of Peter McGovern, deceased, claims of the defendant, Philadelphia and Reading Railway Company, a corporation incorporated under the laws of the State of Pennsylvania, the sum of $20,000 as damages, which sum is justly due and payable to the plaintiff by the defendant upon the cause of action, of which the following is a statement:

The plaintiff, Bridget McGovern, as administratrix of the said estate of Peter McGovern, deceased, brings this action for the benefit of Patrick McGovern and Bridget McGovern, the surviving parents of said Peter McGovern, in accordance with the provisions of the Act of Congress, approved April 22, 1908, entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases," and its amendment, approved April 5, 1910.

The defendant, Philadelphia and Reading Railway Company, is a common carrier corporation engaged in the business of transportation, both of freight and passengers, and of interstate and foreign commerce, and is incorporated for this purpose under the laws of the State of Pennsylvania.

On or about the twenty-fourth day of December, 1912, in the neighborhood of 9 o'clock A. M., or thereabouts, said Peter McGovern was employed by said defendant corporation in the capacity of section hand or section laborer, on and about the tracks, roadbed, right of way, trains, cars, locomotives and other apparatus and instrumentalities used and employed by said defendant in its interstate and foreign commerce and traffic, and more particularly on and about the

tracks, roadbed, right of way, trains, cars, locomotives and other apparatus and instrumentalities used and employed by said defendant at and about what is known as Sixteenth Street Junction, or somewhere in that section, located in the city of Philadelphia, Pennsylvania.

While said Peter McGovern, on and about said date, and while in the said employ of said defendant, was engaged in the proper, careful and necessary performance of his duties as section hand or section laborer, and while he was engaged in interstate and foreign commerce and traffic on behalf of said defendant, and while said defendant, a common carrier corporation, was engaged in interstate and foreign commerce and traffic, without any negligence or carelessness whatsoever on the part of said Peter McGovern, and due entirely to the negligence, carelessness and oversight of said defendant corporation, its failure to supply proper, necessary and safe devices, or other instrumentalities, appliances and apparatus, in order to properly warn and admonish said Peter McGovern of the approach and passage of locomotives, cars and trains on the tracks, roadbed and right of way of said defendant corporation, and due entirely to the failure and neglect of said defendant corporation to, in any proper, efficient and safe manner, forewarn and caution said Peter McGovern of the whereabouts, location and approach of trains, locomotives and cars, and also due to the failure and neglect on the part of the said defendant corporation to provide and supply for said Peter McGovern and his fellow-workers, a reasonably safe place in which to work, without any proper warning or notice, said Peter McGovern was run down and struck by a locomotive and train, belonging to, owned, controlled and directed by said defendant corporation, and which locomotive, cars and train were running upon and using the tracks, roadbed and right of way of said defendant corporation, and which train was being run in a negligent, careless and improper manner, under the circumstances, and by reason of being so run down and struck by said locomotive, cars and train, said Peter McGovern lost his life.

By reason of the death and killing of said Peter McGovern, his said father and mother, Patrick McGovern and Bridget McGovern, are robbed and deprived of his support and maintenance for all future time, and have been otherwise put to great trouble and expense, all to their damage in the sum of $20,000, as above mentioned.

Wherefore plaintiff, as administratrix, brings this suit in accordance with the provisions of said Acts of Congress.

GEORGE DEMMING,
Attorney Pro Plaintiff.

PLEA.

(Filed July 14, 1913.)

To Clerk of above Court:

Defendant railway company pleads not guilty.

WM. CLARKE MASON,
Counsel for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

November Sessions, 1913. No. 2580.

Bridget McGovern, Administratrix, and so forth,

v.

Philadelphia and Reading Railway Company.

BILL OF EXCEPTIONS

Be it Remembered, That in the said term of November, 1913, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the county aforesaid before the Honorable J. WHITAKER THOMPSON, judge of the said court, the ninth day of February, 1914, the aforesaid issue between the said parties came to be tried by a jury of the said county for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff offered evidence as particularly set forth in the following transcribed stenographic notes of testimony, whereupon the learned trial judge directed the jury to render a verdict in favor of the defendant upon the ground that the Federal or District Court of the United States had no jurisdiction in said suit, and said suit could not be maintained inasmuch as the parties benefited by said suit and in whose behalf said suit was begun and prosecuted were non-resident aliens; all as hereinafter set forth.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

November Sessions, 1913. No. 2580.

Bridget McGovern, Administratrix, and so forth,

v.

Philadelphia and Reading Railway Company.

Before HON. J. WHITAKER THOMPSON, J., and a Jury.

Philadelphia, Monday, February 9, 1914.

Present: GEORGE DEMMING, ESQ., representing the plaintiff; WILLIAM CLARKE MASON, ESQ., representing the defendant.

TRANSCRIPT OF TESTIMONY, RULINGS OF THE COURT, CHARGE OF THE COURT AND EXCEPTIONS.

Jury sworn Monday, February 9, 1914.

PLAINTIFF'S EVIDENCE.

BRIDGET MCGOVERN, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?
A. 1810 Spruce Street.
Q. And are you employed there?
A. Yes.
Q. In what capacity?
A. I am employed as a waitress.
Q. As a waitress?
A. Yes.
Q. How long have you been in this country?
A. Six years.

Q. Are you a sister of Peter McGovern?
A. Yes.
Q. Who was killed in this accident?
A. Yes, sir.
Q. How old was Peter?
A. Peter McGovern was twenty-four years old.
Q. Was he married?
A. No.
Q. Are your parents living?
A. Yes, sir.
Q. What are their names?
A. Patrick McGovern and Bridget McGovern.
Q. Whereabouts do they live?
A. They live in Ireland.
Q. What is the age of Patrick, your father?
A. Patrick is fifty-five years old, and my mother is fifty.
Q. Patrick is fifty-five and Bridget is fifty?
A. Yes.
Q. Have you taken out letters of administration on your dead brother's estate?
A. Yes, sir.
Q. Are these the letters?
A. Yes, sir.
MR. DEMMING: I offer the letters in evidence.
MR. MASON: No objection.
The letters are as follows:

"EXHIBIT A.

No. 5945.

COMMONWEALTH OF PENNSYLVANIA, } ss.:
COUNTY OF PHILADELPHIA, }

LETTERS OF ADMINISTRATION.

I, David Martin, Register for the Probate of Wills and Granting Letters of Administration in and for the County of Philadelphia, in the Commonwealth of Pennsylvania:
(Seal)
To Bridget McGovern,

Send Greeting:

Whereas Peter McGovern, departed this life intestate on the 24th day of December, 1912, at 9.15 o'clock A. M., being at and immediately prior to the time of his or her decease an inhabitant of the said County of Philadelphia, or having divers Goods and Chattels, Rights and Credits within the said County, by means whereof the ordering and granting administration of the said estate within the Commonwealth of Penn-

sylvania doth appertain unto me. And I, desiring that the said estate may be well and faithfully administered and distributed according to law, Do hereby depute, constitute and appoint you, the said Bridget McGovern, Administratrix, of all and singular the Goods, Chattels, Rights and Credits which were of the said intestate, and with full power and authority by the tenor of these presents to demand, collect, sue for, recover and receive the same; hereby requiring you to cause to be made, under the solemn oath or affirmations of two disinterested appraisers, a true and perfect inventory and conscionable appraisement of all and singular the Goods, Chattels, Rights and Credits of the said intestate and to file the same in our said Register's office within thirty days from the date hereof; furthermore to file in our said Register's office a true and just account of your administration upon your solemn oath or affirmation at the expiration of one year from the date hereof, or when thereunto legally required, to pay the debts of said intestate so far as the assets received by you will thereunto extend and the law required; and to distribute the net balance of said estate, if any, to and among the parties entitled by law to receive the same after deducting therefrom and paying to the Commonwealth of Pennsylvania whatever sums, if any, should be paid to the said Commonwealth for Collateral Inheritance Tax.

In testimony whereof, I have caused the seal of said office to be hereunto affixed at Philadelphia aforesaid, this 10th day of April, A. D. 1913.

H. C. Broomall,
Deputy Register.

Fees:

Letters of Administration, $3.00
Certificate 1
Filing Renunciation
Paid $3.00."

By Mr. Demming:

Q. That is since the accident?

A. Yes, sir.

Q. Were your parents dependent in any way upon the earnings of Peter McGovern, your brother?

Mr. Mason: That is objected to. Do not testify to that.

A. Yes, my father and mother were.

The Court: You must not answer, when an objection is made, until I tell you to.

Mr. Mason: I object to that, until we get her in a position where she can more definitely describe what they were depend-

ent upon, and what was their financial condition at the time of his death.

(Question withdrawn.)

By MR. DEMMING:

Q. I will withdraw that question so that you will not have to answer it at this time. You have already said that both your parents, and of course the parents of Peter, who was killed——

(Objected to.)

By MR. DEMMING:

Q. Patrick and Bridget McGovern, whom you have just spoken about, lived in Ireland, and are your parents, and the father and mother of Peter McGovern, too?

A. Yes.

Q. Peter was your brother?

A. Yes.

By MR. MASON:

Q. He was your full brother?

A. Yes, sir.

By MR. DEMMING:

Q. Your full brother?

A. Yes, sir.

Q. How old are you?

A. Twenty-three years old.

Q. Are you the next child to Peter?

A. Yes.

Q. The next youngest child?

A. Yes.

Q. Patrick McGovern and Bridget McGovern, your father and your mother, live in Ireland?

A. Yes.

Q. They live in what part of Ireland? In the city or in the country?

A. In the country.

Q. In the country?

A. Yes.

Q. What do they live on?

A. They have a little farm. It is not very large.

Q. Do they own the farm or rent it?

A. They rent the farm.

MR. MASON: I will have to object to her testimony, as to what was the condition in Ireland at the date of this accident, because she came over here six years ago.

By Mr. Demming:

Q. Are you in constant communication with your parents?
A. Yes, sir.
Q. You write to them and they write to you?
A. Yes, sir.
Q. And they live in the same place now as when you came over?
(Objected to.)
A. Yes, sir.
Q. Do they?
Mr. Mason: That is objected to.
The Court: What is your objection to that?
Mr. Mason: The objection to it is very obvious. This young lady, in this country, not having been in Ireland for the last six years, cannot testify to anything of her own knowledge.
The Court: Cannot she testify to where her parents reside?
Mr. Mason: No, sir. The postmark on letters may be a presumption, but it is not proof.
(Objection overruled.)
(Exception noted for defendant, by direction of the court.)
(The following question was read: "Q. And they live in the same place now as when you came over?")
A. Yes, sir.

By Mr. Demming:

Q. And that place is what? You have already said that the place was a farm. Is that correct?
A. Yes, sir.
Mr. Mason: It is understood that my objection covers this whole line of testimony?
The Court: Yes.

By Mr. Demming:

Q. What county is that farm in?
A. County Cavan.
Q. That is in the interior of Ireland, is it? It is away inside of Ireland?
A. Yes, sir.
Q. How far from the coast, if you know? How far from any big city?
A. Ten miles. It is about ten miles from a big city.
Q. What city is that? What is the name of that city?
A. Anescellan.
Q. That is a village, is it not?
A. Yes, sir.
Q. Ten miles from there?
A. Yes, sir.

Q. It is how far from the coast? Do you know how far it is from the coast?

MR. MASON: Which coast?

A. About twenty miles.

By MR. DEMMING:

Q. Is that the east coast or the west coast of Ireland?

A. The east coast of Ireland.

Q. I will have to ask you this question, because this gentleman wants to know the financial condition of your parents, not your judgment, but so that we can form a judgment of it. What kind of a house do they live in, on this farm?

A. They live in a little house, three rooms in it.

Q. Three rooms?

A. Yes.

Q. Is it one story or two stories?

A. One story.

Q. One story?

A. Yes.

Q. How many cattle has your father?

MR. MASON: That is objected to. We are getting this testimony into the present, when it is utterly impossible for her to testify to it. I must object to it.

THE COURT: How can she testify to that?

MR. DEMMING: Do you mean as to the present time—as to the time of this accident?

THE COURT: Yes.

MR. DEMMING: I will ask her another question.

By MR. DEMMING:

Q. Do you know at the time of the accident to Peter, your brother, how many cattle your father had on the farm?

MR. MASON: That is objected to, unless I have the opportunity to cross-examine her, as to how her knowledge is acquired.

THE COURT: You can do that. She can say yes or no, whether she knows.

A. Yes.

By MR. MASON:

Q. When was the last time you were in Ireland?

A. About six years ago is the last time I was in Ireland.

Q. And you have never been back there since?

A. No, sir.

Q. So that the only way you have any knowledge at all about what is going on at home is the letters that you sometimes get from there?

A. I know that the circumstances are the same as when I left there.

Q. The only way you know anything at all about it is from the letters you get from home? Is not that right?

A. Yes.

Q. And you yourself have not seen your father nor your mother since you came over to this country? That is right, is it not?

A. Yes, sir.

Q. In addition to letters, have friends of yours gone back, and then came and told you about it, too?

A. Yes.

MR. MASON: Let us have the friends, then.

MR. DEMMING: We have two people here in court.

MR. MASON: Put them on, then.

By MR. DEMMING:

Q. Are two of these friends here in the court room?

A. Yes, sir.

Q. One is John McGovern?

A. Yes.

Q. And John McGoldrick?

A. Yes.

Q. Is the John McGovern in court any relative of yours?

A. Yes, he is a cousin of mine.

MR. DEMMING: I will stop this line of questioning with this witness. I want to produce the best evidence possible, of course.

By MR. DEMMING:

Q. Do you know whether or not your brother Peter sent money to your father and mother?

A. Yes, sir.

Q. For their support?

A. Yes, sir.

Q. How much a month did it amount to? About how much?

A. He sent on an average of from ten to fifteen dollars a month.

Q. Would you see the money that he would send to them?

A. Yes, sir.

Q. Did you sometimes send it yourself for him?

A. Sometimes I sent it myself, and sometimes he sent it himself.

Q. And that money was used by them for their support, was it?

A. Yes, sir.

MR. MASON: That is objected to. Mr. Demming knows he ought not to do that.

THE COURT: It is objectionable. The answer and the question will be stricken out.

By MR. DEMMING:

Q. What you know about it is that that is the amount of money that he would send to them?
A. Yes, sir.
Q. How long had Peter been in this country?
A. He had been here for a year and seven months.
Q. A year and seven months?
A. Yes, it was about that.
Q. At the time of the accident?
A. Yes, sir.
Q. Of course, you don't know anything about the accident?
A. No.
Q. You did not see it?
A. No.
(No cross-examination.)

MR. DEMMING: I will read, at this stage of the case, a stipulation between counsel.

MR. MASON: Of course, my objection is to its admissibility.

MR. DEMMING: You agreed to the stipulation.

MR. MASON: I agreed if they were here they would so testify, but I would object to their testimony.

MR. DEMMING: The stipulation reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

June Sessions, 1913. No. 2580.

Bridget McGovern, Administratrix, &c.,

v.

Philadelphia and Reading Railway Company.

STIPULATION.

It is hereby agreed between counsel for the plaintiff and counsel for the defendant in above entitled case, that at the trial of this cause it may be stated as a matter of record that if Patrick McGovern and Bridget McGovern were called as witnesses they would testify that they were the father and mother respectively of Peter McGovern, deceased; that during the six months prior to December 24, 1912, they had jointly received from their said son as a contribution toward their sup-

port a sum amounting on the average of ten dollars per month during the said period.

It is further agreed that the said statement shall have the same force and effect upon the record in above entitled case as the testimony of the said witnesses would have if given in open court.

And further, that either party to these proceedings may supplement the said evidence or rebut the same by any other competent testimony.

GEORGE DEMMING,
Counsel for Plaintiff.

WM. CLARKE MASON,
Counsel for Defendant."

MR. MASON: The testimony of the two beneficiaries is objected to in this case, on the ground that there is no averment in the statement that they were benefited in any way whatsoever by the deceased in his lifetime.

MR. DEMMING: With regard to that statement made by Mr. Mason, I would say that this statement is drawn in accordance with the wording of the Act of Congress, that is to say, the suit is brought and the statement is drawn in the name of this young lady as the administratrix of the estate of Peter McGovern, deceased, and she states that she brings the suit on behalf of her father and mother, Patrick McGovern and Bridget McGovern. It is a matter of evidence, I take it, at the time of the trial, a matter of proof at the time of the trial, to show whether or not they were dependent upon the deceased at the time of the accident.

MR. MASON: Nobody can recover under that act, unless they were actually dependent. Therefore, it is essentially part of the basis of their claim. If there is no one who is dependent, there is no basis for any suit by the administratrix, or anybody else, and my thought is that the pleadings, not being complete, the whole action, which is based on them, must necessarily fall.

(Objection overruled.)

(Exception noted for defendant, by direction of the court.)

MR. MASON: I might add that some of these questions are entirely new, under the act, and I am simply raising them, so as to save the time of all of us hereafter, by raising them now.

MR. DEMMING: I think, in view of the last statement of my friend, it ought to be said here that Mr. Mason and I pretty fully considered this matter, before we agreed to this stipulation. We found that these two people resided in such an

isolated part of Ireland—at least, I found that these people resided in such an isolated part of Ireland, it was almost practically impossible to get a commission there. That is the reason why we wrote out this stipulation.

JOHN MCGOLDRICK, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?
A. 2617 Ann Street.
Q. What is your business?
A. Laborer.
Q. How long have you been in this country?
A. Since May. Since the sixth of May.
Q. Since the sixth of May?
A. Yes.
Q. Of this year?
A. Yes, sir.
Q. And you are from what country?
A. From Ireland.
Q. When you were in Ireland this last time—when did you go over?
A. April.
Q. In April, 1913?
A. Yes.
Q. You had been to this country before?
A. No, not to this country.
Q. Is that right?
A. No, not in this country. I never was in this country.
Q. Never in this country before?
A. No, sir.
Q. Where did you go from in April to Ireland?
A. From Glasgow.
Q. When you went the last time to Ireland did you see Patrick McGovern and Bridget McGovern?
A. Yes, sir.
Q. The father and mother of this young lady and of Peter McGovern?
A. Yes.
Q. Did you know Peter in his lifetime?
A. Yes, sir.
Q. And you know that they are the father and mother of Peter?

A. Yes, sir.
Q. How long have you known the family?
A. Since I was able to walk.
Q. Since you were able to walk?
A. Yes.
Q. Did you ever live in that neighborhood?
A. Yes.
Q. When did you see them last?
A. In April last.
Q. In April?
A. Yes.
Q. 1913?
A. Yes.
Q. Where did they live?
A. They lived on a wee farm.
Q. Where?
A. On a farm.
Q. In what part of Ireland?
A. County Cavan.
Q. Was that the same farm they lived on how long?
A. Since I have ever known them.
Q. Do they own the farm or rent the farm?
A. They rent it.
Q. How big a farm is it? How many acres?
A. I could not exactly say how many acres it is.
Q. Give us your best judgment. You have often seen it, have you not?
A. Thirty-five acres, as far as I know. I am not a judge of acres. I am not a very good judge of acres.
Q. You think about how many acres, do you say?
A. About thirty-five acres.
Q. Is it good fertile land, or barren ground?
A. It is very barren.
Q. How big a house do they live in?
A. A small house.
Q. How many rooms has it?
A. Two rooms.
Q. How many stories has it?
A. One story.
Q. One story?
A. Yes.
Q. Have they a barn?
A. No, they have no barn.
Q. They have no barn?
A. No.

Q. How many cattle had they when you saw them in May or April?
A. Four.
Q. Four what?
A. Four.
Q. What were they? Cows?
A. Three cows.
Q. Three or four?
A. There was a younger one. There was a younger one.
Q. A younger one?
A. Yes.
Q. Did they have any horses?
A. No, sir.
Q. No horses?
A. No.
Q. Did they have any young children?
A. Yes.
Q. How many of those?
A. There are seven of them altogether. Four young ones.
Q. Were they what you would call prosperous people or poor people?
A. Poor.
Q. If you know, were they dependent upon the earnings of their children that had come over to America?
MR. MASON: That is objected to. I hardly think this witness is an expert on that subject.
THE COURT: I do not think that requires expert testimony.
MR. MASON: He is making him an opinion witness. I do not think he is in a position to testify to that.
MR. DEMMING: Possibly that is an opinion. I wanted to show all the facts here, and leave this question to the jury, to say whether or not they were dependent.
By MR. DEMMING:
Q. Are Patrick McGovern and Bridget McGovern hard working people?
A. Yes, sir.
Q. Do they do daily work on this farm?
A. Yes, always.
Q. How many children have they in America, or had they at the time that Peter died?
A. Two.
Q. Peter and Bridget?
A. Yes.
Q. Do you know of your own knowledge whether Peter sent money to them when he was living over here?
A. Yes, sir; I often heard he sent money home.

CROSS-EXAMINED.

By MR. MASON:

Q. How many children did you say the McGoverns had when you left Ireland, living on the place?

A. Five living on the place.

Q. And then Peter and Bridget, who were in America?

A. Yes.

Q. That is the same place that they have had ever since you have known them, is it not?

A. Yes, sir.

Q. And they have been working on that place, and they raised their whole family on it?

A. Yes.

Q. And what else besides farming the place that they lived on did Peter do, or did Patrick do, if you know?

A. He was working with the other men there.

Q. Patrick McGovern worked around for the other people?

A. Yes, he had to earn money around with other people.

Q. That is to say, he was a perfectly able bodied man, and worked outside?

A. He worked on his own farm, he kept his own farm.

Q. And did other work besides?

A. Yes, he had to do it.

Q. And he did it?

A. Yes.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. By saying that he had to do it, do you mean that he could not make enough off his own farm, that he had to work for other people, too?

A. Yes, sir.

Q. You say there were five other children over there on the farm with them?

A. Yes.

Q. How old were they?

A. One was about twenty-seven, I suppose.

Q. Twenty-seven?

A. Yes.

Q. That is one older than Peter?

A. Yes.

Q. Where was he working?

A. He was working around near home.

Q. He was working around home?

A. Yes.

Q. How old was the next one?

A. The next two were here.

Q. That is Peter and Bridget?
A. Yes.
Q. How old is the next one under that?
A. I judge about fourteen years now.
Q. About thirteen?
A. About thirteen or fourteen.
Q. Was that a boy?
A. Yes, that was a boy.
Q. Where was he?
A. At home.
Q. At home?
A. Yes.
Q. Did he go to school or work, or what?
A. Yes, he went to school.
Q. How old was the next one?
A. I could not say.
Q. Younger than that one yet?
A. Yes, three younger.
Q. Do you know whether that was all? Is that all?
A. Yes.
Q. Two younger than Bridget at home?
A. Four younger.
Q. One, you say, was thirteen or fourteen?
A. Yes.
Q. Thirteen or fourteen?
A. Yes.
Q. One younger than that?
A. Yes.
Q. Was there one still younger than that?
A. Yes, one still younger.
Q. How old was the youngest one?
A. About four years old.
Q. About four years?
A. Between four and five years old.
Q. Then there was one between that boy, who was thirteen or fourteen, was there?
A. Yes.
Q. Was that a boy or a girl?
A. A boy. They are all boys, except Bridget.
Q. Are they all boys with the exception of Bridget here?
A. Yes.
Q. Did you know anything about how much Peter earned over here?
A. No.
Q. You did not know that?
A. No, sir.

RE-CROSS-EXAMINATION.

By MR. MASON:

Q. In December of 1912, Patrick McGovern and Mrs. McGovern were living on the farm, were they?

A. Yes.

Q. They had never been to America, so far as you know?

A. Not that I know.

JOHN MCGOVERN, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where did you last live?

A. 2617 Ann Street.

Q. That is the same place as McGoldrick lives?

A. Yes.

Q. What do you do over here?

A. Trucker on the Pennsylvania Railroad.

Q. How long have you been a trucker?

A. About a month.

Q. Are you from Ireland?

A. Yes, sir.

Q. And are you any relative of Bridget McGovern, the lady sitting here?

A. Yes, sir; a cousin.

Q. What are you?

A. A cousin.

Q. How are you related to her?

A. My father and her father were two brothers.

Q. So that you are a first cousin?

A. Yes, sir.

Q. How long is it since you have been in Ireland?

A. It is three years the last twenty-first of February.

Q. Three years?

A. Yes, sir.

Q. When you were over there at that time did you see Patrick McGovern and Bridget McGovern, the father and mother of Bridget McGovern and Peter McGovern?

A. Yes, sir.

Q. You did?

A. Yes.

Q. Where were they living then?

A. They were living in County Cavan.

Q. On a farm?

A. Yes.

Q. You say you have known them how long?
A. I have known them since childhood.
Q. How old are you now?
A. Twenty-five years old.
Q. Twenty-five?
A. Yes, sir.
Q. How long have they been living on that farm?
A. They have been living there for as long as I remember.
Q. As long as you know?
A. Yes, sir.
Q. How big a farm do you think it is?
A. About twenty-seven or twenty-eight acres of land.
Q. Twenty-seven or twenty-eight acres?
A. Yes.
Q. What sort of a house do they live in?
A. A one story house.
Q. How many rooms has it?
A. Three small rooms.
Q. Three small rooms?
A. Yes.
Q. Have they a barn?
A. Yes, sir; a small barn, a right small barn.
Q. And how many cattle have they?
A. They have two cows.
Q. When you knew them they had two cows?
A. Yes, sir.
Q. Anything else besides cows? Any other cattle?
A. That is all I know.
Q. Had they horses or pigs?
A. No, sir.
Q. No pigs?
A. Yes, they kept a couple of pigs.
Q. How many?
A. Yes, they kept two pigs.
Q. Had they any chickens?
A. No.
Q. No chickens?
A. No.
Q. What sort of ground was this, if you are able to tell? Have you been over this farm many times?
A. Yes, sir.
Q. Was it good fertile ground or barren ground?
A. No, sir; it was barren ground.
Q. What did they raise on the ground, if anything?
A. Very little. It was just good for grazing the two cows on it.

Q. They just kept those two cows. Did they raise any crops of any sort?

A. Yes, they raised things.

Q. What did they raise?

A. They raised some potatoes and cabbage.

Q. How many children had they altogether including Peter and Bridget?

MR. MASON: We have got that. Bridget McGovern testified to that.

By MR. DEMMING:

Q. Is it your recollection they had seven children altogether?

A. Yes, sir.

Q. And that four of them are still at home?

A. Yes, sir.

Q. Or five?

A. Yes, sir.

Q. Are five at home, or four?

A. There are five at home.

Q. And how many of those that are home are younger than Bridget?

A. Four younger than Bridget.

Q. And of those four at home, how many are able to work, old enough to work?

A. Two.

Q. Two?

A. Yes.

Q. And how old are they, the ones that are old enough to work?

A. There is one about twenty-one and the other about sixteen.

Q. Did you know Peter McGovern in this country?

A. Yes, sir.

Q. Did you know him pretty well?

A. Yes, sir.

Q. Did you know how much he made a month or a week when he was working here?

MR. MASON: That is objected to.

By MR. DEMMING:

Q. Did you ever see his checks by which he was paid?

A. Yes, sir.

Q. Or his vouchers, or whatever you call them?

A. Yes.

Q. You saw those?

A. Yes.

Q. Did you see them when he was working for the railroad company, or when he was working for other people?

A. I saw them when he was working for the railroad company.

Q. You know when he was killed, do you? Do you know the date on which he was killed?

A. Yes.

Q. What date was it?

A. It was on the twenty-fourth of December.

Q. Of last year?

A. Yes, sir.

Q. Of course, at that time he was working for the railroad company?

A. Yes.

Q. Before that time was he working for the railroad company, in November?

A. He was working for the U. G. I.

Q. How many months did he work for the U. G. I.?

A. Two months.

Q. That was September and October, was it not?

A. Yes, sir.

Q. Did you see his checks when he was paid by the U. G. I.?

A. Yes, sir; he showed me his pay checks.

Q. How much was he paid a week?

MR. MASON: That is objected to. I think we will have to have the checks.

THE COURT: The checks would be the best evidence.

MR. DEMMING: If we only had the checks they would be.

THE COURT: Or the pay roll of the company.

(Objection sustained.)

(Exception noted for plaintiff, by direction of the court.)

By MR. DEMMING:

Q. Did you see the checks when he was paid by the railroad company, too?

A. Yes, sir; I saw the checks. I saw the railroad checks.

MR. MASON: I have given you the exact amounts.

MR. DEMMING: You have given part of it.

MR. MASON: I will get all the checks here, if you want them.

MR. DEMMING: You have got September and October, "No time." That was the time he was working at the U. G. I., and he made money then also.

MR. MASON: The witness has testified to that.

By MR. DEMMING:

Q. Do you know whether or not he was ill during part of the summer of 1912?

A. No, sir.

Q. That he could not work part of that time?

A. No, sir.

Q. Do you know of your own knowledge whether or not he sent money home to his parents?

A. Yes, sir; he sent money. Yes, sir; he did.

Q. Do you know of your own knowledge about how much a month that would be?

A. He sent ten or fifteen dollars home twice to my own knowing. He sent ten or fifteen dollars twice to my own knowing home.

Q. How long was that before he was killed?

A. That was May and June before he was killed.

Q. May and June?

A. Yes.

Q. Do you know how much he sent in November and December before he was killed?

A. No, sir.

(No cross-examination.)

BRIDGET MCGOVERN, recalled.

By MR. DEMMING:

Q. Did Peter, your brother, who was killed in this accident, work all of the summer of 1912?

A. No, there was part of the summer that he had a cold and he did not work.

Q. What was the matter with him?

A. He had a bad cold.

Q. He did not make full time?

A. No, he did not make full time.

Q. During September and October, when he worked for the U. G. I. Company, the gas works, did he make full time then?

A. Yes.

Q. Did you see his checks at that time?

A. Yes, sir.

Q. That he got from the U. G. I. Company?

A. Yes, sir.

Q. What was the amount of those checks that you saw as paid by the U. G. I. Company?

(Objected to.)

(Objection sustained.)

(Exception noted for defendant, by direction of the court.)

By MR. DEMMING:

Q. You gave your brother's age as how old? How old did you say he was?

A. Twenty-four.

(No cross-examination.)

MR. DEMMING: I will read another stipulation in this case, as follows:

"November 1, 1913.

McGovern v. Railway Co.:
George Demming, Esq.,
Land Title Building.

Dear Sir:

At the trial of the above case in the U. S. District Court, to save the time of witnesses, and for the purpose of expediting the trial, I will admit without formal proof, that for the purposes of this case it is conceded:

1. That Patrick McGovern, the deceased, was employed by the defendant company as a section hand, and while so employed earned the following sums during the months indicated below:

July, 1912,	$12.72
August, 1912,	17.17
September, 1912,	No time
October, 1912,	No time
November, 1912,	28.90
December, 1912,	33.66

2. That the engine which struck and killed the deceased was hauling a train from Jersey City, N. J., to Philadelphia, Pa., in the service of interstate commerce, and was controlled and managed by the defendant company, and at the point of the accident was traveling upon the tracks, roadbed and right of way of the defendant company.

Yours very truly,

WM. CLARKE MASON."

ANTONIO PARENTO, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. See if you can talk English plain enough so that we will not require an interpreter.

A. I cannot talk English.

Q. Where do you live?
A. 2963 Salmon Street.
Q. What number?
A. 2963.
Q. Who do you work for?
A. I cannot speak.
Q. Who do you work for now?
A. Now?
Q. Yes, who do you work for now?
A. Reading Railroad.
Q. You work for the Philadelphia and Reading Railroad Company?
A. Yes.
Q. What do you do for them? What kind of work do you do?
A. I cannot speak.
MR. MASON: I think we are wasting time.
THE COURT: I think we had better have an interpreter.

(Giocoleo Marcolondo was sworn to act as interpreter.)
(From this point the witness was examined through the interpreter.)

By MR. DEMMING:

Q. Where do you live?
A. 2963 Salmon Street.
Q. Who do you work for now?
A. Reading Railroad Company.
Q. What do you do for them?
A. Laborer on the track.
Q. On the tracks?
A. Yes.
Q. And who were you working for on December 24, 1912?
A. I was working for the same company, but our foreman's name was Dominick, my foreman's name was Dominick.
Q. At that time?
A. At that time.
Q. Now you have another foreman? Is that the idea?
A. The same foreman.
Q. You have the same foreman now?
A. The same foreman.
Q. Was Peter McGovern a member of your gang of section hands?
A. He was. We were together.

Q. How many men were in that gang?
A. About twenty-four or twenty-five.
Q. Whereabouts were you working on December 24, 1912?
A. We worked at Richmond. Then we got an order to go to work at Sixteenth and Indiana Avenue.
Q. That is what they call the Sixteenth Street Junction, is it not?
A. Oh, I don't know just exactly what you call it.
Q. (Photograph shown witness.) Can you recognize the place on there where they were working? I don't know whether that shows it or not. We do not want a full explanation, but does that show it?
A. Yes, we were working right here at that time (indicating).

By Mr. Mason:

Q. Where? There?
A. Yes, there.
Q. Right here?
A. Yes.
Q. What is your name?
A. Antonio Parento.

By Mr. Demming:

Q. Do you know the numbers of those tracks, how you knew them by number?
A. No.
Q. What time of the morning was this? Was this in the morning or afternoon?
A. It was between eight and nine A. M.
Q. Eight A. M.?
A. Yes.
Q. What were you doing there at that place? What were all you men doing?
A. Moving the snow from the tracks.
Q. What did you have for that purpose? Shovels, I suppose?
A. Brooms. We just used brooms.
Q. Just brooms?
A. That is all.
Q. Tell us in your own way how this accident happened.
A. I did not see the accident myself. One of my fellow workingmen called my attention that there were two men laying dead upon the track, and all the gang went all together towards where the bodies were laying, and we then picked up the bodies and brought them to the tool house.
Q. Before the accident happened, what was the gang of men doing?

A. The gang was scattering around, three or four in one place, and two or three another place, where everybody was attending to their own work.

Q. Were they all on one track?

A. No, sir.

Q. What tracks were they on?

A. I don't know that, I cannot give you the number exactly, because I am not an expert.

Q. It does not need an expert for that, what you saw.

A. I cannot tell you the number. I don't know the number. The boss knows the number of the tracks. I don't know.

Q. That is, Dominick?

A. Yes, sir.

Q. What track was McGovern working on?

A. I don't know. He was working on the track. He was working in the center of the track, but I don't know the number of the track.

Q. Were you working on the same track McGovern was working on?

A. No, the one next to him.

Q. The one next to him?

A. Yes, sir.

Q. How far were you from McGovern?

A. Oh, I judge about twenty or thirty yards.

Q. Twenty or thirty yards?

A. Yes, sir.

Q. You saw McGovern shortly before he was hit, did you not?

A. Yes, I did.

Q. Just before McGovern was struck what train had come through there?

A. The inbound train from New York.

Q. Was that the train that struck McGovern?

A. The train coming from New York to Philadelphia, that is the one that struck him.

Q. Struck McGovern?

A. Yes.

Q. Before that train struck McGovern, were any signals given, or any warnings of any kind whatsoever that the train was coming?

A. No, sir; only the boss said, "Look out," but it was snowing there, too much smoke, and we could not see anything, and we did not hear anything.

Q. Were you working on the same track with McGovern at the same time, or the next track to it?

A. The same place which I was working before, the same track.

Q. What was that place?

A. The track next to him.

Q. The track next to him?

A. Yes.

Q. How many trains were going by at the time McGovern was struck?

A. There were so many, six or seven. I don't recall. I don't remember. I don't know. I had to attend to my work, and I could not watch the trains. I could not count the trains going in and out, you know.

Q. Had McGovern anything at all to call his attention to the fact——

MR. MASON: That question is objected to, even putting it to the interpreter. It is a matter of opinion.

THE COURT: The form of that is objectionable.

(Question withdrawn.)

By MR. DEMMING:

Q. Had McGovern's attention in any way been called to the fact that this New York train was coming before he was struck by it?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff, by direction of the court.)

By MR. DEMMING:

Q. What were the conditions of the air at this place at this time?

A. Very badly, snowing, windy, and smoking, and everything else, and trains were coming in and out. It was very windy and snowing.

Q. There was something else you said?

A. Trains were coming in and out.

Q. Was there any smoke or steam?

A. Smoke, yes. The smoke was very dense.

Q. Was the smoke lying low, or high?

A. Low.

Q. Were you able to see this New York train before it came along at that place?

A. No, sir; I could not.

Q. Was there any watchman or any lookout stationed to warn the men of a train coming on that track before McGovern was struck?

A. It may be, but I don't know. There was not anything near where I was.

Q. If so, was any warning given by such a person?

A. Yes, the boss said, "Look out." That is the only warning we got.

Q. When the boss said "Look out," did McGovern have time to get away?

MR. MASON: That is objected to. It is a conclusion.

(Question withdrawn.)

By MR. DEMMING:

Q. When the boss said, "Look out," how long was that before the train struck McGovern?

A. About half a minute. Maybe less than that. Immediately upon him saying ,"Look out," the train struck him. The train came by.

Q. Immediately?

A. Just immediately.

(Court adjourned until Tuesday, February 10, 1914, at ten o'clock A. M.)

SECOND DAY.

Philadelphia, Pa., Tuesday, February 10, 1914, 10 A. M.

Present: Parties as before noted.

ANTONIO PARENTO, recalled.

By MR. DEMMING:

Q. You said when court adjourned yesterday that immediately upon the boss calling out "look out," this train struck McGovern. Have you anything more to say about that?

A. When my boss called attention he said, "Look out," and that was the Norristown train, which they all stepped off the track for, and immediately after that the inbound train from New York came, which was the one that struck McGovern.

Q. Then the train that the boss called out "look out" for, the Norristown train, was not the train that struck McGovern?

MR. MASON: That is objected to.

THE COURT: It is decidedly leading.

(Question withdrawn.)

THE COURT: The witness can state what the boss said and what happened, but he cannot state his conclusion.

By MR. DEMMING:

Q. Was the Norristown train, the train that you say the boss called "look out" for, the train that struck McGovern?

MR. MASON: I object to that question, because I do not understand it. The question, as I understand it, that is the proper question, is what the boss said, and what happened after the boss called out. It seems to me we are getting a conclusion here from this witness in answer to a very leading question.

MR. DEMMING: I asked what he saw and what happened at the time of the accident.

THE COURT: Do I understand he has stated of his own knowledge that the first train that came was a Norristown train, then the New York train came after that?

MR. DEMMING: Yes, on another track. As I understand it, the boss called "look out," then came along the Norristown train on one track, and they all stepped on to another track, and as they stepped on to the other track, then came the New York train, and it ran into them. That is my understanding of it.

THE COURT: He can state which train ran into him, if he knows.

MR. MASON: That is something he does not know, of his own knowledge.

THE COURT: Let the witness state whether he knows or not.

MR. MASON: Mr. Demming, if you are going to press that point, I will make you prove it.

MR. DEMMING: You can make me prove anything that is proper and legal. I am perfectly willing to do that.

By MR. DEMMING:

Q. Which train was it that struck McGovern? The Norristown train or the New York train?

A. The New York train.

Q. The New York train?

A. Yes.

Q. Did the New York train run on the same track that the Norristown train ran on?

A. No, sir.

Q. How many tracks were there at that point?

A. Two or three or four. I am not precise, as to the numbers of the tracks. The weather was too stormy and windy and snowy and smoking, that I could not exactly say.

Q. When the boss called "look out" just before the Norristown train came, as you have stated, what did you and the other men do?

A. We stepped out from the track, and went close by to the ditch. We were looking out for the Norristown train, though.

Q. Then, after you did that, what happened immediately after that?

A. About a half minute after, no one of us knew that the train was coming, and then one of my fellow workingmen called my attention, he said, "Look, somebody is killed on the track."

Q. Which train is that you are talking about now?

A. The New York train.

Q. And which track was that with reference to the track that the Norristown train was on? Was it the next track to the track the Norristown train was on?

A. The next track.

Q. Was there any warning? Did the boss give any warning, or was there a warning in any way given that the New York train was coming on that track?

MR. MASON: That is objected to as leading.

THE COURT: Ask what warning was given, if any. That is the proper question.

(Question withdrawn.)

By MR. DEMMING:

Q. What warning, if any, was given that the New York train was coming on that track?

A. No, sir; there was no watchman there.

Q. Was any warning given at all that the New York train was coming?

A. Nobody.

Q. Did you see McGovern after he was struck?

A. Yes, I did.

Q. Was he dead at that time?

A. Yes, he was dead. He died instantly.

CROSS-EXAMINED.

By MR. MASON:

Q. Yesterday you told us that you did not see McGovern struck. Is that true?

A. I did say that I did not see him, but my friend told me he was struck by the train.

Q. So that you do not know which train hit him, do you?

A. I was told that it was the New York train.

Q. You yourself did not see which train hit him, and you do not know except from what somebody else told you, do you?

A. I saw the train went by, but after that train went by my friend called my attention that someone was struck by the train.

Q. Two trains went by, did they not?

A. Only one.

Q. After the boss yelled "Look out," did one or two trains go by?

A. Only one.

Q. You do not know where that train came from, do you?

A. I think it was a Norristown train.

Q. You only know what you were told, and nothing of your own knowledge concerning these trains? Is not that right?

A. I was told the train was from Norristown, but the train was there, the train went by.

Q. But where the train was from you do not know of your own knowledge, do you?

A. I told you I was told that it was coming from Norristown.

Q. And that is all you know about it, is it?

A. That is all.

Q. You said yesterday you did not know whether a watchman was on duty or not, because you could not see him for the snow. Is that true?

A. Yes, I did say I could not state it positively that the man was there or was not there.

Q. Then, who told you since yesterday to say there was no watchman there?

A. No, sir; no one.

Q. Why did you say so a few moments ago?

A. What did I say?

Q. Did not you say that there was no watchman there a few moments ago?

A. Because I did not see it.

Q. You don't know whether or not a watchman was there, then?

A. No, sir; I could not say. The weather was too tempestuous. I could not say that.

MR. MASON: I move to strike out the testimony concerning the identity of these two trains on the ground that it is all pure hearsay.

THE COURT: What part of the testimony do you want stricken out?

MR. MASON: That part of his testimony which specifies that there were two trains, one from Norristown and one from New York.

MR. DEMMING: I do not think it is material where the trains were from. The fact remains that one train came on one track and another train came on another track. My friend has admitted that the train that struck this man was a train from New York, bearing interstate commerce.

THE COURT: I will not strike it out. I do not see that there is any ground for striking it out. It is a question for the jury as to whether he identified the trains or not.

MR. MASON: My only reason for making the motion is that I want to keep the record as narrow as possible.

THE COURT: You have got it on the record that he does not know.

MR. MASON: My feeling is it is only fair, after the cross-examination discloses that the witness has been testifying to that which is pure hearsay, that a motion to strike out is essential to keep the record clear.

THE COURT: If you can indicate any particular question and answer you want stricken out I will entertain it, but it is so intermingled with other testimony, I do not see how it can be stricken out.

MR. MASON: All right. I will let it stand.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. Was it the train that you were told was a train from Norristown—was it that train that struck McGovern?

A. I was told it was a Norristown train. The boss and somebody else told me it was a Norristown train, but I don't know.

Q. The train that struck McGovern, which of the two trains was it, the train you were told was from Norristown, or the train you were told was from New York?

A. I was told that it was a New York train that struck McGovern.

Q. You have already said they were running on other tracks?

MR. MASON: That is objectionable, of course, but apparently there is no use objecting.

MR. DEMMING: I am trying to get out the whole truth.

MR. MASON: Mr. Demming knows that these questions are improper, that they are all hearsay, and he ought not to clog up the record in that way.

MR. DEMMING: If they are improper, let my friend object, and not make these remarks afterwards, that they are improper, and I know all about it. I don't know any such thing.

MR. MASON: I have objected so often.

DOMENICO DIMASSENIO, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. 2641 East Somerset Street.

Q. Where are you employed? Who do you work for?

A. I work down in Richmond.
Q. Who do you work for?
A. I work for the Reading on the elevation.
Q. The Reading Railroad?
A. Yes, sir.
Q. Were you the foreman?
A. Yes, sir.
Q. Of this gang of laborers at the time that McGovern was killed?
A. Yes, sir.
Q. How many men had you in the gang?
A. Thirty.
Q. Thirty?
A. Yes. Twenty men working at the Sixteenth Street junction, and ten men working at Brown Street.
Q. Twenty men working where?
A. Twenty men working at the Sixteenth Street Junction and ten men working on Brown Street on the twenty-fourth of December, 1912.
Q. Where was McGovern working?
A. McGovern was working for me at the Sixteenth Street Junction.
Q. The Sixteenth Street Junction?
A. Yes.
Q. And what were they doing up there that morning?
A. I go there to clean the snow.
Q. What time did you go up there?
A. I started to work at 3.40.
Q. 3.40 in the morning?
A. Yes, sir.
Q. Do you remember the day of this accident? Do you?
A. Yes, sir.
Q. What day was it?
A. The twenty-fourth of December, last December, 1912.
Q. What time of the day, about, did it happen?
A. About 9.20.
Q. About 9.20?
A. Yes.
Q. Will you tell the court and jury in your own way just how this thing happened?
A. It happened this way. About 9.20 a Norristown train was coming for Philadelphia on the Norristown side.
Q. It was coming in to Philadelphia?
A. Coming in to Philadelphia on the Norristown side, I guess on No. 4 track.
Q. No. 4 track?

A. Yes, sir. I see the train before it got to the tower, I see the train before the curve, before the tower, the Norristown train, coming to Philadelphia, and I hollered to the men working on No. 4, on the Norristown side, and I have got there about five or six, working on the switch, and then I said "Look out, fellows," on the Norristown side, for the train coming to Philadelphia.

Q. You said "Look out"?

A. Yes, on the Norristown side.

Q. Not the New York?

A. No, sir. I don't see the New York train at all.

Q. Why didn't you see it?

A. I cannot see it, because the New York train was back of the curve, before the tower.

Q. Back of the tower?

A. Yes, sir. When the Norristown train was there, my fellows working on the Norristown side, they all got out, they were all away, but the rest were working there, and when the Norristown train was right there there was smoke and snow, it was blowing right across, and I cannot see the New York train.

Q. Did you get any warning that it was coming, that the New York train was coming?

A. No, sir.

Q. Any bell or whistle?

A. No bell or no whistle.

Q. Did you know it was coming? Did you know the New York train was coming?

A. I cannot look out for two trains at one time. One train was going to Philadelphia on the Norristown side. That is the first train I see, at the Sixteenth Street Junction, where I am working the gang, and the other fellows all got out right at that part, and all the rest worked.

Q. Where was McGovern?

A. McGovern was working on No. 2.

Q. McGovern was working on the Norristown track with the gang?

A. No.

Q. Which track was he working on?

A. No. 2, New York.

Q. The New York track?

A. Yes.

Q. That was alongside of the Norristown track, was it? Was No. 2 directly alongside of No. 4?

A. New York, coming to Philadelphia, No. 2 track, and when the Norristown train was there, it was a little bit slack, but the steam and the smoke and the snow blew on the track

across, and I did not see the New York train. I guess the tower man let her pass the New York train first, I don't know, because that is not my business, I don't know, but the New York train passed first because the Norristown train was slack, and I got Peter McGovern employed there to work there, cleaning out, and when the New York train went past, it knocked Faetti down, and he touched me on my leg, too, and knocked me down, and when I got up I saw Peter McGovern on the other side of the ditch there. Peter McGovern worked right there in the center of switch No. 2.

Q. Do I understand you to say that you were knocked down, too, by the train?

A. Yes, sir.

Q. How many men were knocked down by this train?

A. The train did not knock me down. Faetti knocked me down. The man knocked me down.

Q. The man who was killed by the New York train knocked you down? Is that the idea?

A. The man that was killed by the New York train knocked me down, Faetti. I was right there. When Faetti was turning over, he touched me on the right leg and knocked me down, and when I got up there I saw Peter McGovern in the ditch. Peter McGovern was on No. 2 track, in the center.

Q. Faetti, the other man who was killed, knocked against you and knocked you down?

A. Yes, sir.

Q. That is what you say?

A. Yes, sir.

Q. When you got up you saw McGovern had been knocked down, too?

A. Yes, sir.

Q. He was lying there? Is that right?

A. Yes.

Q. Was McGovern dead at that time?

A. Dead right away.

Q. Was Faetti dead, too, the other man who was killed?

A. No, the other man lives about an hour or an hour and a half. He is dead in the hospital.

Q. Had any warning been given to McGovern that the New York train was coming?

A. No, sir.

Q. He knew nothing about it?

A. No, sir; nothing.

Q. Where was your watchman that morning?

A. The watchman was there that morning, but he goes to change his shoes, he got his feet wet.

Q. Who went to change his shoes? The watchman?

A. The watchman.

Q. At the time of this accident, had the watchman gone away to change his shoes?

A. Yes, at the time.

Q. You have said it, in different parts of your testimony, or in your statement, but I want to get it perfectly clear, so that we will all understand it—what was the condition of the atmosphere, the weather that day?

A. It was bad weather.

Q. What kind of weather?

A. Snow.

Q. Was there any steam or smoke about there?

A. Yes, steam and smoke from the Norristown train, it was there at the Sixteenth Street Junction by the Norristown train, which slacked a little bit, and the steam and the smoke and the snow covered all across the line.

Q. Was the New York train late or not, do you know?

MR. MASON: That is objected to.

By MR. DEMMING:

Q. If you know. Do you know of your own knowledge whether or not the New York train was late?

A. That it is late?

Q. Yes.

A. I don't know, because railroad time changes every month, and I was temporary there at that time, I was fresh, because I live down on Richmond Street, me and my gang.

Q. How fast was the New York train going when it struck this man?

A. How fast?

Q. How fast was it running?

A. It was running fast. They never could have stopped there.

Q. Was it running fast or slow?

A. Not slow.

Q. Not slow?

A. No.

MR. MASON: I object to any further questions concerning the speed from this witness, as he has shown he does not know.

MR. DEMMING: He can say whether it was going fast or slow.

MR. MASON: Not under the decision of the Supreme Court he cannot.

THE COURT: Why not?

MR. MASON: Because "fast" or "slow" are terms which are not permissible in determining speed when speed is at all important. It is purely a guess.

MR. DEMMING: He saw it.

CROSS-EXAMINED.

By MR. MASON:

Q. How long had you been there before the accident happened?

A. About five hours.

Q. And how had the weather been during the whole of that time?

A. Snow. It is bad weather.

Q. And the trains had been passing backward and forward there during the whole of the five hours?

A. Yes, sir; trains passed there all the time.

Q. And you called to your men whenever you saw a train coming, to get out?

A. I called to my men when I saw the Norristown train coming.

Q. Every time?

A. Every time I called to my men, every time, the number of the track. I called to my men all the time, because the trains pass there steady all the time.

Q. Why didn't you call to them when you saw the New York train coming?

A. I did not see the New York train. These fellows were working there attending to their work.

Q. Why didn't you see the New York train?

A. I did not see it, because it was a bad morning, snow, and the Norristown train was a little bit slack, and there was steam and smoke and snow in front of the New York train.

Q. Then, when the Norristown train went by, the smoke and the steam from that train hid the New York train from your view? Is that it?

A. Yes, sir.

Q. You say McGovern was working on the New York track?

A. Yes, sir.

Q. How many other men were working there with him?

A. I got three there at that time.

Q. Three?

A. Yes.

Q. Where were the other men working?

A. The other men were in the ditch that is there.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. Had you full charge of the gang?

A. Yes, sir.

Q. You were the only man who had charge of them?

A. Yes, sir; I was.
Q. Including McGovern?
A. Yes.

RE-CROSS-EXAMINATION.

By MR. MASON:

Q. During the morning before that train came you had called to the men "Look out" for the trains, had you not?
A. I called to the men all the time. All the time.
Q. Because there were a number of trains going up and down there?
A. I called to the men "look out" for trains, the number of the track.
Q. During the whole of that morning you had been telling them to look out for the different trains that went up and down there?
A. Yes, sir.

By MR. DEMMING:

Q. When you saw a train coming, when you knew a train was coming, then you told them to look out?
A. Every train coming, the number of the track, I told the number of the track.
Q. You called the number of the track?
A. Yes, sir; but the train on the Norristown side, I called out to the fellows "look out, you fellows on the Norristown side, the train coming for Philadelphia," and if there was a train on No. 2, I called No. 2, if they were working on No. 2, they are all away, and if there was a train coming on No. 3, I called to the fellows on No. 3, and they are all away, and if there was a train coming on No. 4, I called to the fellows on No. 4 to look out of the road, that a train would be on No. 4. Every train coming, I called to my fellows, the number of the track. I called all the time to my fellows. Trains pass all the time. I call the number of the train, when I see a train coming I say "No. 2," I call out to the fellows.
Q. You would call the number of the track, and then you would say "look out," and they would know which track to get off of then? Is that the idea? At the time you told them to look out you called out the number of the track?
A. Yes, sir.
Q. Unless you called out they would not get off the track?
A. The people that were working on No. 2, what I called to, they are always away, and all the rest attended to the work.
Q. You said a while ago—I did not make a note of it here—what was the number of the track that the Norristown train came on?

A. No. 4.
Q. No. 4?
A. Yes.
Q. What was the number of the track that the New York train came on?
A. No. 2.
Q. Was No. 2 track directly alongside of the other?
A. Yes.
Q. How many other tracks were there there?
A. About four.
Q. Four others?
A. Four main line tracks.
Q. Four altogether, or four more?
A. Four altogether.
Q. Four altogether?
A. Yes.
Q. Were trains running on all four tracks?
A. Sometimes they run on No. 2 and sometimes they run on No. 4, and sometimes they run on No. 3, and sometimes they run on No. 1.

PHILIP CANTANDO, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?
A. 3641 East Somerset Street.
Q. What do you do? What do you work at?
A. Drive.
Q. A driver?
A. Yes.
Q. Who were you working for on December 24, 1912?
A. Dominico's gang.
Q. Dominico's gang?
A. Yes.
Q. Working for the Reading Railroad?
A. Yes, sir.
Q. Were you a member of this gang that McGovern was on?
A. Yes, sir.
Q. What time did you go to work that morning?
A. I don't know. Half-past four, I guess. Four o'clock, or twenty minutes after four. I ain't got no watch in my pocket and I don't know.
Q. Whereabouts were you working?
A. I worked at Sixteenth and Indiana Avenue.

Q. That is what they call the Sixteenth Street Junction, is it?

A. I don't know about that.

Q. What kind of weather had you that morning?

A. It is bad weather.

Q. Tell us what you mean by that. What do you mean by "bad"?

A. Well, snow.

Q. Snow?

A. Snow.

Q. Did you see the accident to McGovern?

A. Yes, sir.

Q. Tell us all you know about it.

A. I see the first train coming. The foreman he called out, he said "heads up." That means the Norristown train.

Q. The Norristown train? That was the Norristown train?

A. Yes. Well, we started to work over there yet. There was another train coming behind that one, but that one makes smoke, the first train makes smoke. The first train makes smoke, and he got slow, you know. He make steam, smoke and steam.

Q. You say the first train was running slow?

A. Yes, sir.

Q. That is the Norristown train?

A. Yes, I think Norristown, I guess.

Q. What track was that on?

A. I don't know. I don't know whether No. 1 or No. 3. I don't know.

Q. You don't know the number?

A. No.

Q. Go ahead.

A. Well, after that train was slow over there, there is another train coming behind that one. That was called the New York train, and we did not see that train at all, it just came and knocked down two men over there, because it came fast.

Q. That train, which you say you were told was the New York train, was that on the same track that the Norristown train was on?

A. No, sir.

Q. Another track?

A. Another track.

Q. Was that track next to the Norristown train?

A. Yes, sir.

Q. When was it you first saw the New York train coming? How far away was it?

A. It just came on right away. It came quick.

Q. Can you tell us, can you give me any idea how many feet away it was when you first saw it?

A. I don't know. I think twenty or twenty-five feet I was away.

Q. Twenty-five. Why could not you see it before that?

A. I don't know, because there was a lot of smoke and a bad morning, snow.

Q. You could not see it. Which train was it that hit McGovern?

A. That is the New York train.

Q. He was working on that track, was he?

A. Yes, sir.

Q. Did McGovern, or did anybody have any warning of any kind that the New York train was coming?

MR. MASON: I object to the form of that question.

A. No, sir.

(Question withdrawn.)

By MR. DEMMING:

Q. Was any signal given that the New York train was coming?

A. No, sir.

Q. Did the foreman tell the men the New York train was coming, or any train was coming on that track?

A. No, sir. The first train came. He said, "Look out," that is the Norristown train. The second train came, the New York train, because he don't see it.

Q. He did not see it?

A. No, sir.

Q. Did you see McGovern after he was struck?

A. Yes, sir.

Q. Was he dead at that time?

A. Yes, right away immediately dead.

Q. How long had you known McGovern, Pete McGovern, the dead man?

A. Before he was dead?

Q. Yes, before he was dead.

A. Eight months, I guess, eight or nine months, I guess.

Q. What kind of a man was he? That is, what kind of habits had he?

A. He was a good fellow. He was a good man.

Q. A good man?

A. Yes.

Q. Was he a healthy man?

A. Oh, he was a good man. I don't know that, because he lived in another place. I see my friend on the job.

Q. You saw him on the job?
A. Yes, sir.
Q. Was he a man of good habits? Did he drink at all, do you know?
A. I never saw him drink.
(No cross-examination.)

BRIDGET MCGOVERN, recalled.

By MR. DEMMING:

Q. Did you have a picture of your brother, your dead brother?
A. No, I had no picture, only that one.
Q. Was that picture taken before he died?
A. That picture was, yes.
Q. This is the only one you have of him?
A. This is the only one.
Q. How long before he died was this taken?
A. The summer before he died.
Q. Do you remember about what month?
A. It was some time in the summer. I was out in the country at the time. I could not just exactly say.
Q. Is that the picture?
A. Yes, sir.
Q. Will you point out to the jury which is Peter there?
A. That is the one.
Q. Just hold it around so that they can see it. That little fellow sitting down there?
A. Yes, sir.
Q. With regard to your brother's health, was he a sickly man or a healthy man?
A. He was a healthy man.
Q. He was a healthy man?
A. Yes.
Q. What sort of habits did he have?
A. He had good habits.
Q. Did he drink any?
A. No, he had not been drinking. He did not drink, he did not take intoxicating drink for several months before he died.
Q. How long had he been in this country before he was killed?
A. About a year and seven months.
MR. DEMMING: I subpoenaed last night the bookkeeper or timekeeper of the United Gas Improvement Company. We thought at first it was the Point Breeze Gas Works, but we found out it was the Richmond Gas Works, and we did not get

him until this morning. He is on his way down here and I ask to be allowed to call him out of order, so as to prove the time and money Peter McGovern made while he was there in September and October, 1912.

THE COURT: You can do that.

MR. DEMMING: Then I will close.

(Counsel for defendant moved for a nonsuit.)

(Motion overruled.)

DEFENDANT'S EVIDENCE.

WESLEY ALPAUGH, having been duly sworn, was examined and testified as follows:

By MR. MASON:

Q. You were the engineman of a train from New York to Philadelphia on December 24, 1912, that got into the Terminal a little after nine o'clock, were you not?

A. Yes.

Q. And do you recollect the accident happening at the Sixteenth Street Junction?

A. Nothing more than what I was told. I don't know.

Q. And you were told afterwards the accident had happened, which has been described here?

A. I was told after I got into the Terminal.

Q. As you approached the Sixteenth Street Junction, what warning did you give of your coming train?

(Objected to.)

(Objection overruled.)

A. I blew the whistle.

Q. Where?

A. The regular road crossing signal.

Q. Where?

A. Right above the tower, and just as I passed it.

Q. That is, you gave two signals?

A. I gave two signals, yes.

Q. What is the road crossing signal you gave?

A. Two long and two short whistles.

Q. And what kind of a bell did you have on the engine that morning? Was it a hand bell or an automatic bell?

A. An automatic bell.

Q. Do you know of your own knowledge whether that bell was ringing?

A. No. The bell was behind me on top, what we call the turtle back, with the back door closed, it was storming, and you cannot tell if it is ringing or not.

Q. What kind of a day was it?

A. It was a very bad stormy day, snowing.

Q. As you passed the Sixteenth Street Junction, was there a train ahead of you or not, do you remember?

A. Just right alongside of me they were coming off of the Norristown branch.

Q. Was there any smoke or steam from that train?

A. Steam.

Q. Did it interfere with your view at all, or not? Did the steam and smoke from that train interfere with your view or not?

A. Yes. It came right down on the track.

CROSS-EXAMINED.

By MR. DEMMING:

Q. You had control of that train? You were the engineer?

A. Yes, sir.

Q. You say you blew the whistle?

A. Yes.

Q. At what point was that?

A. Just before I got to my tower, and after passing it, both.

MR. MASON: Perhaps these photographs will help.

MR. DEMMING: They are not in evidence yet.

MR. MASON: They will be in evidence.

MR. DEMMING: Are you going to put them in evidence?

MR. MASON: Yes.

By MR. DEMMING:

Q. What tower do you mean on that photograph? Do you recognize that photograph?

A. It looks like Sixteenth Street to me.

Q. How long have you been running on that road?

A. About eighteen years.

Q. Do you recognize that?

A. There is a tower right here. There is a tower.

Q. There are towers all along there, are there not?

A. No, they are not all along there. There are different towers. There is one at Wayne Junction, Sixteenth Street and Huntingdon Street. This is the tower at Sixteenth Street. I did not see that other track that comes in there. The tower is in between the Norristown branch and the New York branch.

Q. You do not recognize it on this picture?

A. I don't see the tower there; no, sir.

Q. What makes you think you rang your bell or blew your whistle at that point? What makes you think so?

A. I don't think anything about it. I know it.

Q. What makes you know it?
A. Because I blew it.
Q. You always do it? That is the idea? You always blew it before?
A. No, sir.
Q. You do not always? What times do you blow it and what times don't you blow it?
A. When it is bad foggy weather I blow the whistle as a rule for a warning if I cannot see down there, to see if things are clear.
Q. Then, you say you blew the whistle because it was a damp, foggy morning?
A. Yes, sir.
Q. Did you see this gang of men at all?
A. No, sir.
Q. Why didn't you?
A. I could not for the storm and the steam.
Q. You could not see them?
A. No.
Q. Weren't you late that morning?
A. Yes, sir.
Q. How late were you?
A. I could not tell you exactly, but about twenty minutes. About twenty minutes late.
Q. You were running pretty fast, weren't you, at that point?
A. No; not fast.
Q. You were not running fast? Weren't you trying to make up all of that time you could?
A. No, sir.
Q. You were not?
A. No, sir.
Q. At all events, you did not see anybody at all, and you knew nothing about the accident until you got in the terminal?
A. I did not.
Q. And with regard to the bell, you don't know anything about that, with regard to the bell, you know nothing about it?
A. No.
Q. You don't know whether the bell was rung or not? Can't you hear me?
A. I can hear you, but I did not quite understand that.
Q. You don't know whether the bell was ringing or not?
A. No, sir; I don't know. I could not tell whether it was ringing or not. All I know is I had the air turned on to it. It rings by air.

Q. Sometimes it rings, and sometimes it does not; is that the idea?

A. Sometimes it rings, but at other times the bell will turn over.

Q. Was it ringing?

A. I could not. I could not hear it myself in the cab.

Q. Had you been told there were a lot of men working on the track at that point?

A. No, sir.

Q. Before this; before the accident?

A. No, sir.

Q. You knew nothing about that?

A. No, sir.

ALBERT DUMPKEY, having been duly sworn, was examined and testified as follows:

By MR. MASON:

Q. You were the fireman of this train, were you not?

A. I was.

Q. And where were you as you passed the tower of the Sixteenth Street Junction?

A. In the tank.

Q. By "in the tank" you mean in the tender which is back of the engine proper?

A. Yes, sir.

Q. As you came to the Sixteenth Street Junction, what warnings, if any, did you hear, coming from the engine?

A. I heard the whistle blown, and the bell was ringing.

Q. What kind of a bell is it; an automatic or hand bell?

A. An automatic bell.

Q. And from where you were could you see ahead of the engine, or not?

A. I could not see ahead of it; no.

CROSS-EXAMINED.

By MR. DEMMING:

Q. Why could not you see ahead?

A. We had the side curtains up.

Q. Why?

A. I had the side curtains up to keep out the snow and the wind.

Q. It was snowing, then, was it?

A. It had been over. I had not chance to take them down.

Q. Isn't it one of your duties to look ahead?

A. Yes; when I am not engaged in firing.

Q. Were you firing at that time?

A. I might not have been just them. I was all the way down through there.

Q. Were you firing at that time? You were pulling into the station, were you not?

A. No.

Q. You were pretty close to it?

A. Yes. When you burn hard coal you have got to keep with your fires.

Q. You were going at a pretty good clip?

A. No; we were not going fast. We were not going more than twenty or twenty-five miles an hour.

Q. Twenty or twenty-five miles an hour. You were late, were you not?

A. I believe so.

Q. Don't you know?

A. No.

Q. You don't know?

A. No.

Q. Did you see this man struck?

A. No.

Q. Did you see anybody struck?

A. No.

Q. Did you know anything about it until you got into the terminal?

A. I did not know it then.

Q. You did not know it then?

A. No.

Q. You did not even know you had run through a gang of men, did you? You did not even know you had run through a gang of men, did you?

A. No.

Q. How do you account for it that you struck men, and did not know it?

A. Because I could not see.

Q. You could not see, why?

MR. MASON: He said he was in the tank.

THE WITNESS: I was in the tank, and we had the side curtains up, and I could not see ahead of the engine.

By MR. DEMMING:

Q. Was it a bad morning, or not?

A. It was a bad morning.

Q. You say you heard the whistle blown?

A. I did.

Q. And the bell was ringing?

A. Yes.
Q. Where was the whistle blown?
A. It blew approaching the tower.
Q. Right opposite the tower, or after you got by the tower?
A. I could not just say right opposite. Right in the vicinity of the tower.
Q. Wasn't it after you got by the tower that you blew the whistle?
A. I did not blow it.
Q. You heard it?
A. I heard it; yes.
Q. Did not you hear it after you got by the tower?
A. There were two whistles blown. I heard one under the bridge and one before we came to the bridge.
Q. The bridge is below the tower, is it not? Isn't the bridge between the tower and the terminal, the station?
A. Yes.
Q. And you heard the whistle when you were under the bridge?
A. Yes; I heard one before we came to the bridge.
Q. Just before you came to it?
A. Not just before. A little before.
Q. Were not you between the tower and the terminal, or between the tower and the bridge, when you heard the first whistle?
A. I could not say.
Q. You could not say?
A. No.
Q. And is not that the point when you first heard the bell?
A. No; the bell had been ringing all the way down.
Q. All the way down from where?
A. All the way down from Wayne Junction.
Q. Did you know that these men were on the track?
A. No.

JOHN BRADLEY, having been duly sworn, was examined and testified as follows:

By MR. MASON:

Q. Where were you on this morning just before the accident happened?
A. Right about the Seventeenth Street bridge.
Q. And by whom were you employed?
A. Philadelphia and Reading.
Q. What were you doing there?
A. I was standing at the dwarf signal.

Q. Do either of these pictures show approximately where you were? (Photographs shown witness.)

A. Right about there (indicating on photograph).

Q. Right about where the man is whose figure appears on the right-hand side of that picture?

A. Yes, sir.

By Mr. Demming:

Q. What signal do you call that?

A. A dwarf signal, a small signal.

By Mr. Mason:

Q. About how far from the tower was that?

A. I judge that to be about ten hundred feet or eleven hundred feet.

Q. And how near were you to the men that were working below there?

A. How far was it, did you say, from the tower down?

Q. How far was it from the tower?

A. I guess it was about fifteen feet from the tower.

Q. And how far were you from the men, the gang of men that were working down below?

A. That was about ten hundred feet.

Q. Did you see these two trains pass?

A. Yes.

Q. What attracted your attention to the New York train?

A. The whistle.

Q. Where was the train when that whistle blew?

A. Passing the tower. It was such a wicked whistle, I thought there was some danger.

Q. And after the train passed by the gang you saw the accident had happened?

A. Yes; I saw the men all running, and I judged it to be an accident.

Q. You went down there and found there had been an accident?

A. No; before I ran down I said to the tower man, I said——

Q. You cannot tell what you said to anybody. After you got down there you found the accident had happened?

A. Yes; I found the accident had happened.

Cross-Examined.

By Mr. Demming:

Q. Where was this gang of men working?

A. Below the Sixteenth Street tower.

Q. Were not they working just about opposite that tower?

A. Working down below the tower, down on the slip switch.

Q. It was just about opposite, just across from the tower, was it not?

A. No; the tower is about ten hundred feet from there, or eleven hundred feet from there.

Q. Which tower are you talking about?

MR. MASON: The same tower everybody is talking about.

By MR. DEMMING:

Q. Is that the tower in there that you mean? (Indicating on photograph.)

A. The tower is up above the Seventeenth Street bridge.

Q. The tower you mean is not shown on this photograph at all?

A. Yes, sir.

MR. MASON: Show him the picture a little closer.

THE WITNESS: Yes; the tower is shown.

By MR. DEMMING:

Q. Which tower is it?

A. There is the tower in there.

Q. Just above the bridge?

By MR. MASON:

Q. That building there (indicating on photograph)?

A. Yes; that is the tower.

By MR. DEMMING:

Q. The only tower you can see? This is the tower, is it not?

A. Yes.

Q. Do you call that a tower (indicating on photograph)? That is an old abandoned station, is it not?

A. That is a coal box.

Q. That is the tower that you mean (indicating on photograph)?

A. Yes.

Q. Where were these men working when you saw them?

A. Right here, right in along here (indicating on photograph).

Q. About here?

A. Yes; right here.

Q. Where the tracks are crossing each other?

A. Yes; right at the slip switch.

Q. What you call the slip switches?

A. Yes.

Q. That is, at a point between the bridge and the terminal station?

A. Yes.

Q. That you call the Seventeenth Street bridge, do you?
A. Yes.
Q. What time of the day was this?
A. I judge it to be about 9.02 or 9.10, somewhere in around there.
Q. You heard what you said was a very wicked whistle?
A. A very wicked whistle, two blasts of the whistle.
Q. Two blasts?
A. Yes, sir.
Q. How long have you worked on the railroad?
A. About seven years.
Q. What does that mean?
A. That is two blasts of the whistle, when he puts his hand on the cord, and pulls the whistle.
Q. But what is the signal? What does that mean? To get off the track?
A. Yes; to get off the track.
Q. In other words, that indicated to the engineer that he saw somebody on the track?
MR. MASON: That is objected to. It does not indicate anything of the kind. I object to that question. In the first place, it is asking for an opinion, which cannot be given from this witness. In the second place, he is trying to throw something in here which he knows is not right.
THE COURT: It is hardly cross-examination. It is his opinion.
MR. DEMMING: He is a railroad man.
THE COURT: I know he is a railroad man, but he has been examined on what occurred. He has not been examined as to any opinion that he had.
MR. MASON: I would not object to the gentleman testifying what is meant by the signal, what the signal indicates, but when he says that it indicated that the engineer saw something on the track, I certainly object to that.
MR. DEMMING: You have objected already.

By MR. DEMMING:

Q. Where was the engine when it gave that very wicked whistle?
A. Right about somewhere in around the Sixteenth Street tower there, right above the junction point there.
Q. Was it above or below the tower?
A. When I looked around it was just about opposite, for the first whistle, and a little under the bridge for the second.
Q. How far were you from this?
A. From where?
Q. From the engine.
A. From the engine?

Q. Yes; at that time.

A. I was over on the Norristown siding, like, on the south-bound Norristown; I don't know just how many feet it is.

Q. You just said it was one thousand to twelve hundred feet to the tower, then you took that back and you said it was fifteen feet from the tower.

A. About fifteen feet from the tower.

Q. You mean that? You were fifteen feet from the tower?

A. Right to the bridge there, under the Seventeenth Street bridge.

Q. And were you on a track?

A. Yes.

Q. You were on the Norristown track?

A. Yes; the Norristown siding.

Q. You were?

A. Yes, sir.

Q. How many tracks were there between you and the tower?

A. About three.

Q. Three tracks?

A. Yes.

Q. And you think that was only fifteen feet?

A. Two or three tracks. Three tracks. I don't know just exactly how many feet it is.

Q. You think you were one thousand feet from these men?

A. One thousand feet; yes, sir.

Q. Is that what you said?

A. Yes; one thousand or eleven hundred.

Q. Could you see the men there from where you were?

A. Yes; I saw the men working, where I was.

Q. And you could see the train?

A. I saw the train coming.

Q. The New York train?

A. Yes.

Q. And the engineer of that train could see these men one thousand feet away, then?

Mr. Mason: That is objected to.

A. I could not say whether he could see the men or not.

The Court: He says he could not tell.

Mr. Mason: I think I am entitled to ask your Honor, if Mr. Demming does not know that is improper, to tell him so, that it is time for him to learn. I object to it. I have objected to it once before.

By Mr. Demming:

Q. There was a clear view, then, from the engine to where these men were working, was there not, at the time you heard this whistle?

A. From where?

Q. From the engine of the New York train to where these men were working.

A. Before the Norristown train went down there was a clear view. I had been working there before the Norristown train went down.

Q. Before the Norristown train went down?

A. Yes.

Q. Did not the Norristown train go down before the New York train?

A. Yes; just a little while before the New York train. I had seen the men before either one of the trains went down.

Q. I am talking about when you heard this wicked whistle.

A. No; I could not see the men plainly then, because the Norristown train was coaching down there, with the props up, and the steam went to the ground.

Q. At that time you could not see the men?

A. No; not when the train was going down there, when the Norristown train was going down I could not see through the Norristown train.

Q. You were here when the foreman of the gang testified, were you not, Domenico?

A. Domenico?

Q. Yes.

A. Yes, sir.

Q. That he could not see the New York train for the curve. Were not the men around the curve from you?

A. Were the men around the curve from me?

Q. Yes.

A. No; I was standing on the track. That is the junction point, one this way and one that way (illustrating).

Q. You were standing in a position that you could see?

A. Yes.

Q. And then when that whistle did blow from the New York train, the tracks were obscured with steam and smoke?

A. Yes; when the Norristown train went down.

JOSEPH DERHARMER, having been duly sworn, was examined and testified as follows:

By MR. MASON:

Q. By whom were you employed on December 24, 1912?

A. Reading Railroad Company.

Q. And where were you on that morning?

A. Sixteenth Street Junction.

Q. What were you doing there?

A. Helping fix the switches. The snow would get in and stick.

Q. Were you there before the accident happened?

A. Yes, sir.

Q. Was there anything to call your attention to the New York train?

A. Nothing whatever, only blowing his whistle. That is all I know about it.

Q. Where was he when he blew his whistle?

A. I could not just exactly tell you.

Q. Where was he when you saw him after your attention had been attracted to him?

A. Going under the Seventeenth Street bridge.

Q. And about how far, in your judgment, would that point be from where this gang of men were working down below?

A. I could not tell you exactly. I can show you on the picture better.

Q. (Photograph shown witness.) About where? This is the Seventeenth Street bridge on that picture?

A. Yes. There it is.

Q. Just beyond that is the tower?

A. Yes; right there is your tower.

Q. About where were these men?

A. The men were working right there (indicating on photograph).

Q. They were working in these switches here?

A. Yes.

MR. MASON: That is where the witness Parento fixed it.

By MR. MASON:

Q. Just before the New Yorker went down, had any other train gone down?

A. The main line.

Q. From Norristown?

A. Yes, sir.

CROSS-EXAMINED.

By MR. DEMMING:

Q. Those tracks that turn to the right on that picture are the New York tracks, are they not?

A. These tracks here (indicating on photograph)?

Q. Yes.

A. Yes; going to New York.

Q. Then to the left of that picture are the main line tracks?

A. Yes, sir.

Q. The Norristown tracks?

A. Norristown; yes.

Q. What you call the main line, the trains that came down on the main line, came in over these tracks on the left, and the New York trains——

A. Which way are you standing? Which way are you facing?

Q. I mean facing the photograph as you are now.

A. Yes.

Q. That is right, that way, is it not?

A. Yes.

Q. The New York trains had come in on the tracks to the right; that is right?

A. Yes.

Q. You said these men were working somewheres about in here, where these cross-overs are?

A. Right in here where these slips are.

Q. How far is that below the bridge, do you think?

A. I could not tell you.

Q. Couldn't you?

A. No, sir.

Q. How long before this accident had you seen men working there?

A. I remember I went up the railroad in the morning going to work.

Q. Didn't you see them? What time was that?

A. About seven o'clock or half-past seven.

Q. Did not you see them there after that? Had you not seen them after that?

A. After that?

Q. Yes; between seven o'clock and the time of the accident, did not you see them?

A. Yes; I saw them.

Q. How long before the accident had you seen them?

A. That is something I could not say.

Q. Shortly before or a long time before?

A. That is something I could not say.

Q. When you last saw them they were working back at that point you indicated?

A. Yes, sir. That was the last place I saw them.

Q. The last place you saw them?

A. Yes.

Q. When this New York train blew this whistle, could you see the men at that time?

A. No; I did not take notice to them. I did not take notice to them at all.

Q. Were you able to see them?

A. No; not where I was, the steam and the snow had come

down on top of you, the steam and the snow, and I could not see through it; it was all hanging low, you know.

Q. Do you know about what rate of speed the New York train was going?

A. I could not tell you.

Q. Fast or slow?

A. It was not going so fast, in my estimation. The way they go through there.

Q. Compared with rates of speed, they were not going so fast? Was the Norristown train going fast or slow?

A. The Norristown train?

Q. Yes; what you called the main line train.

A. The main line train, he was going ordinary. He was not going through there like a wild man, something like that.

Q. Do you know whether the bell was rung on this New York train?

A. That is something I could not say.

Q. You were right there?

A. I was right there.

Q. Did not you hear it?

A. I could not say.

Q. You could not say?

A. No.

Q. Are you sure it was the whistle of the New York train you heard?

A. Yes, sir.

Q. How many blasts?

A. Two I heard.

Q. Two you heard?

A. Yes, sir.

Q. And at that time the engine was about where with reference to the tower, say?

A. Underneath the Seventeenth Street bridge.

Q. It was underneath the bridge?

A. Going through underneath the bridge.

Q. How far away were you from the engine?

A. Right across.

Q. Are you positive it was just going under the bridge, or had not it gotten below the bridge when it blew the whistle?

A. It makes a sound and you cannot hear the sound right away when the engine goes along.

Q. You are not perfectly sure just where it was when it blew the whistle?

A. When they blow the whistle you cannot tell if it is right alongside of you, the engine would shoot away from you.

Q. You don't know where it was, do you?

A. No.

JOHN J. LEDDY, having been duly sworn, was examined and testified as follows:

By MR. MASON:

Q. You were the towerman for the Reading Railroad on this morning?

A. Yes, sir.

Q. And stationed at what tower?

A. Sixteenth Street tower.

Q. Does the tower appear in this photograph marked "A"? Does the tower appear in there?

A. You can just see it above the bridge.

Q. You can just see it above the bridge?

A. Yes.

Q. Did you know an accident had happened there that morning? You did not see the accident yourself?

A. No; I could not see it.

Q. But you heard an accident had happened there?

A. I heard it; yes.

Q. Before the accident happened what trains went by there—immediately before?

A. There was a Pottsville train went down on the local track.

Q. That is what you call the Norristown train?

A. A Norristown train; yes, sir.

Q. What other train immediately after it?

A. This here New York local train.

Q. What attracted your attention to the New York train?

A. Because he blew before he got to the tower.

Q. How often did he blow there?

A. He blew two long and two short, regular road crossing warning, he blew hard, and after he passed on under the Seventeenth Street bridge he blew again, that is a regular warning for cattle on the track, or danger. He blew hard. He blew it then hard.

Q. Just ahead of him, or just along with him at that point, the Norristown train was going down on the other track?

A. It just went down on the other side; yes.

CROSS-EXAMINED.

By MR. DEMMING:

Q. How many trains were going by there at that time?

A. Which way; north or south?

Q. Oh, both ways.

A. There was only one went down on the Norristown way, on the local track, and there was one coming up on the northbound. That had not got there yet.

Q. One coming up?
A. Yes.
Q. How many tracks are there at that point?
A. There are six. You mean main tracks, or siding tracks?
Q. Altogether.
A. I don't know. There are about eight or nine.
Q. How many tracks are there that trains run on?
A. Six.
Q. Six?
A. Yes.
Q. I am speaking about at the point where the men were working.
A. Oh, there are only four.
Q. Four?
A. Yes.
Q. Are they numbered?
A. Yes.
Q. Do you know them by numbers?
A. Yes.
Q. Let us see if we can get this straightened out. The track that you say the Pottsville train came on, is that the track farthest to the right looking towards the terminal?
A. Towards the terminal, yes; No. 4.
Q. That is No. 4?
A. Yes.
Q. And the track next to that is number what?
A. No. 2.
Q. And the track next to that is number what?
A. No. 1.
Q. And then the farthest track on the left is No. 3?
A. That is right.
Q. So that the tracks in the center are Nos. 1 and 2, the track on the left is No. 3 and the track on the outside is No. 4, facing the terminal?
A. Yes.
Q. That is right?
A. Yes.
Q. I have got it right there, have I not?
A. Yes.
Q. The track that the Pottsville train was running on is track number what?
A. No. 4.
Q. No. 4?
A. Yes.
Q. And the track that the New York train was running on is track number what?

A. No. 2.
Q. No. 2?
A. Yes.
Q. Right alongside of No. 4 track?
A. Yes, sir.
Q. Now, you say you saw what you call the Pottsville train—you call it the Pottsville train?
A. Yes.
Q. You saw that train go by?
A. Sure.
Q. Did you see where the men were working at that time?
A. A couple of gangs were down there working.
Q. No; the gang this man was working in who was killed?
A. I did not; no. I did not know what gang he was working in. I knew there were several gangs down there.
Q. I mean after the accident you knew that gang was there, did you not?
A. I did not; no.
Q. When did you hear of the accident?
A. After it happened.
Q. Did not you know then which gang it was?
A. I did not know what gang he belonged to; no.
Q. You did not?
A. There were seventy-five or eighty men working down there at that time.
Q. Working all over the tracks?
A. All over the tracks.
Q. What were they doing?
A. Sweeping the snow out and cleaning the switches.
Q. After you saw the Pottsville train go by, how long was it before the New York train came?
A. That is a question I could not exactly say.
Q. Was it a short time afterwards, or immediately?
A. Right after, about maybe a minute, a half a minute, something like that.
Q. What was the condition around those tracks with regard to the air, the atmosphere?
A. It was windy and snowy.
Q. Any steam or smoke there?
A. There was steam and smoke on the Seventeenth Street bridge; yes.
Q. And below the bridge, and about where these men were working was steam and smoke?
A. I don't know.
Q. You don't know?
A. I could not see. That is a square away.

Q. If you don't know where these men were working, this man who was killed, you don't know whether it was a square away or not, do you?

A. Oh, yes. We got down there the Sixteenth Street station. That is a square away. I could not see.

Q. That is what you were told afterwards?

A. Yes.

Q. How near were these men working to the tower?

A. About a square away.

Q. About a square away? All of these men you are talking about?

A. No; not all of them. There were some working at the tower.

Q. Some at the tower?

A. Yes.

Q. You say there was a train coming up, coming up from the station, too; is that right?

A. Northbound; yes.

Q. What track was that running on?

A. No. 3.

Q. That is the outside track, and on the left, facing the station?

A. Yes.

Q. How do you know it was the New York train that blew this whistle?

A. How do I know?

Q. Yes.

A. He blew it right before the tower; right before me. He was the only one going down.

Q. But did he blow the whistle the next morning there at the same place?

A. No; he had no reason to blow it.

Q. Why did he have reason this morning?

A. Because he used good judgment. He knew there were men working on the track.

Q. He knew men were working on the track?

A. At least, he expected men would be working on the track. He saw the steam under the bridge, and he blew that warning.

Q. Is there any rule regarding where to blow a whistle at that point?

A. Not particularly; no.

Q. Not unless he sees people working on the track?

A. He can use good judgment. There is a rule that covers everything, to use good judgment.

Q. Was the bell ringing?

A. It surely was; yes, sir.

Q. You think the bell was ringing, too?

A. Oh, I know it was; yes.

Q. Where was it that he first blew the whistle?

A. Right under the Pennsylvania Railroad bridge he blew hard.

Q. Which bridge is that? Is that the bridge shown on that photograph (indicating on photograph)?

A. No.

Q. Which bridge is that that you mean?

A. That is the Pennsylvania Railroad bridge, the Chestnut Hill branch of the Pennsylvania Railroad.

Q. Is it around the curve up here?

A. Yes; right above the tower.

Q. Above the tower?

A. Yes.

Q. That is around the curve, is it not?

A. No; there is not any curve there.

Q. Is not there a curve there for the New York trains?

A. No.

Q. Look at that (photograph).

A. There is a curve down here, but there is not any curve up there at the tower. There is a curve down here.

Q. Do not the New York trains come from those tracks there (indicating on photograph)?

A. Right here, yes; but there is no curve at the tower.

Q. I asked you where he blew the whistle. He blew the whistle before he got to the tower, did he not?

A. Yes.

Q. That was before he got to the curve, toward the straight tracks?

A. Yes.

Q. Is not that right?

A. Before he blew his whistle.

Q. How far above the tower was he when he blew that whistle that you heard?

A. Well, possibly about one hundred and fifty feet.

Q. And where was it he blew the second whistle, according to your judgment?

A. After he went under the Seventeenth Street bridge.

Q. And is that bridge shown on this photograph?

A. Yes; the Seventeenth Street bridge.

Q. You say after he went under that bridge? You don't know how far he was below the bridge when he blew it, do you?

A. No; I could not tell.

Q. As a matter of fact, were not there other trains around there blowing whistles, too?

A. No, sir.

Q. That was the only one; you are positive of that?

A. Sure of it; yes, sir.

Q. And you remember this morning very distinctly, do you?

A. I do; yes, sir.

Q. If you did not see the accident, what impressed this so vividly on your memory?

A. Because I knew by the way he blew the second time that there was danger down there.

Q. In other words, he saw somebody on the track, and blew?

A. I don't know that he saw anybody, but I knew there was danger down there. I was looking for it.

Q. Then, when you heard of the accident afterward, you were not surprised?

A. Not a bit; no, sir.

JOHN H. DRUMMEHLER, having been duly sworn, was examined and testified as follows:

By MR. MASON:

Q. You were the section foreman of the Reading Railroad Company on this day, the day when the accident happened?

A. Yes, sir.

Q. And did you have occasion to go to where these men were working at the cross-over switches there near the Sixteenth Street Junction before the accident happened?

A. I was here all the morning, up to about twenty minutes before the accident happened. Then I was called to Diamond Street for trouble.

Q. What did you say, if anything, to the men, concerning the danger, and what they must do?

A. I located the men there. I went down with Domenico, with his men. I had twelve section men, other section gangs, and I went down to Domenico, and located his men in his gang; he had twenty-eight men, or twenty-nine, and I located them in places right there, I can show you, in the switches, and also, I cautioned him to be very careful, to watch out for his men, and had a watchman down at the Pennsylvania bridge, and there was a watchman up near the Seventeenth Street bridge, about two hundred and fifty feet south of the Seventeenth Street bridge.

Q. What did you say to the men themselves? Did you say anything to them? Did you know McGovern?

A. I knew McGovern; yes, sir.

Q. Was he one of the men you said something to?

MR. DEMMING: That is objected to.

A. He was one of the men; yes, sir.

Q. Did you say anything to any other men?

A. I did; yes, sir. I went to McGovern, I went and told him, the last word I said to him, I said, "Look here, McGovern, be very careful, you are in a dangerous place." I also had told the other section man, who was working for me, in the other gang, with McGovern, at this frog, the point where he was hit.

Q. About where were these men working? Just look at that picture (picture shown witness). Show me.

A. We are going north now?

Q. No; you are going south now.

A. Yes. Here is the tower. I understand it. Right here (indicating on photograph).

Q. At the cross-over switches?

A. Right there is where McGovern was working when I left him about twenty minutes before the accident, right in that frog, and Dominick's gang were distributed right in here (indicating on photograph), that is, his twenty-nine men, and my section man here, who is working for me now (indicating on photograph), one other section gang, I mean. We have two gangs.

Q. This is where Dominick indicated the gang was working, and right at that frog is where McGovern was working (indicating on photograph).

CROSS-EXAMINED.

By MR. DEMMING:

Q. So you went up to McGovern, did you, and you told him that this was a dangerous place, and to look out?

A. I did not go up to McGovern. I was with McGovern when he came on the job, and was with him on the job until about twenty minutes before the accident.

Q. Did you work with him?

A. It was my place to be there and instruct him what to do, and show them what to do, how to keep the switches clear.

Q. What other man had you picked out to, to talk to?

A. I picked out Dominick, and told him to locate his other men the best he could.

Q. Dominick was the foreman?

A. Yes.

Q. You would have reason to do that, but what other men in the gang did you pick out to talk to personally?

A. Not any other, because I could not pick the others——

Q. You only picked out McGovern, the dead man? You only talked to McGovern, the dead man?

A. McGovern was the only man who could talk the English language. McGovern was the only English-speaking man in the gang.

Q. You heard one or two of the others here today on the witness stand. One man, an Italian, who was on the witness stand, could talk English very well. He did not need an interpreter.

A. I had to talk to the foreman, to instruct the foreman what to do.

Q. You instructed the foreman. I am not taking exception to that. But you talked to McGovern?

A. I talked to McGovern there personally. I had been acquainted with him previous.

Q. He was a good man, was he not? He was a good workman?

A. Yes; I had no fault to find with him. I worked with him over in Richmond about three months.

Q. He was a perfectly good workman?

A. Yes.

Q. He was a man of good habits, was he not?

A. His habits I know nothing about. I know nothing about them, good or bad. I only say he was a fair workman. I never was in his company off the railroad.

Q. McGovern was under Dominick, was he not?

A. McGovern worked under Dominick, as a laborer.

Q. Dominick was his foreman?

A. Yes.

Q. And did not McGovern have the right to depend upon Dominick, or a watchman, to warn him that a train was coming?

(Objected to.)

THE COURT: The question is as to whether the deceased had the right to depend on Dominick?

MR. MASON: Yes. They can testify what was done, but they cannot testify what other men thought he had a right to do, or did not have the right to do.

THE COURT: I do not see how you can prove it in that way.

MR. DEMMING: Every time a witness gets pressed in cross-examination, then my friend objects. This man has said he picked out McGovern——

THE COURT: It is not proper cross-examination.

MR. DEMMING: This man has said he picked out McGovern, personally, and warned him to look out for trains. I ask him now if in spite of his talk to McGovern, whether or not McGovern as an ordinary member of the section gang did not have the right to rely upon his boss or the watchman to warn him that trains were coming while he was doing his work.

THE COURT: That is a conclusion. The objection is sustained.

MR. DEMMING: I will withdraw the question.

By MR. DEMMING:

Q. What is the custom with regard to men working in these gangs, with regard to warnings, when trains are coming?

A. At dangerous points, like Sixteenth Street, which we call a dangerous point, we have what we call watchmen that notify them that these trains are coming.

Q. This was a dangerous point, was it not?

A. It always was called a dangerous point; yes, sir. If it was not we would not have a watchman there.

Q. There should have been a watchman there?

A. There was a watchman here.

Q. At the time of this accident?

A. There was a watchman there at the time of this accident. There was a watchman there at the time that train passed. There was a watchman there from the time the men came on duty until the men went home. I know that personally.

Q. You were not there?

A. I was there up until twenty minutes of the accident, and then I was called to Diamond Street. I have five interlocking plants to look after, and I do not stay at one place.

Q. You were not there at the time of the accident?

A. I was not there just at the time; no.

Q. You don't know whether the watchman was there at that time, or not, do you?

A. I know where I left him when I left there, and I know where he was at the time, which was told me by the other employees.

Q. You heard what Dominick said here?

A. I heard what Dominick said, and I think he is very much wrong, that he is very much mistaken.

Q. What makes you think that?

A. I know he was mistaken, because he said there was no watchman there, which is not right, which is not true.

Q. You were away?

A. I was there up to twenty minutes of the time of the accident. Dominick said there was no watchman there at all.

Q. Explain this, then, if that is your contention, why did this train come through the gang of section men without the watchman warning them, if there was a watchman there?

A. The watchman warned them. I think if you asked Mr. Derharmer, he could tell you that that watchman hollered. I have my men in the section gang that I can bring here as wit-

nesses that they heard the man holler, that they heard the watchman holler.

Q. You mean to say that two men would be killed despite the warning of the watchman?

A. Two men killed out of about thirty, that were in that bunch.

Q. That is not many, you think, to be killed?

A. I think if two men were killed out of about thirty in the bunch, that stands to reason that the watchman must have cautioned them some, or the whole bunch would have got killed, it would have got them all.

Q. Despite the fact that you were away, you think there must have been a watchman there?

A. I know there was a watchman there.

Q. You don't know that, because you were not there.

A. I know there was a watchman there, because I placed him there before I left, and I know he would not go away until I went back.

Q. That is the reason?

A. I am as confident of that as anything else.

Q. You did not see the accident, did you?

A. No, sir. I was up near the Cumberland Street tower.

Q. We will go back again to the custom. It is the custom of these men in these gangs, is it not, to continue working until they are told to stop working, that there is a train coming. Is not that right?

MR. MASON: That is objected to. The custom of a man's doing, or not doing, a certain thing, when he is working, is totally immaterial.

THE COURT: That would not bind the defendant, a custom among the men.

By MR. DEMMING:

Q. What is the duty—we will make it that—what is the duty, then, of the men on the section gangs with regard to a warning? Have they the right to rely that someone, the foreman or the watchman will warn them when a train is coming?

MR. MASON: That is objected to. He can testify as to what men give them the warning, but he cannot testify as to what they do when they get the warning.

THE COURT: The question is, what the duty of the defendant to warn them is. Your question involves the question of the duty and the question of right.

MR. DEMMING: I used the word of "custom" and my friend objected to it. I thought it was proper. Here is a man who is familiar with this line of work.

By MR. DEMMING:

Q. What do they do, then?

MR. MASON: What do who do?

THE WITNESS: What do who do?

By MR. DEMMING:

Q. You are a very good repeater of my friend. What do the section men do?

A. They do anything they are told to do, they do any work that is given them by the sub-foremen. We have sub-foreman, I have sub-foreman, and they are supposed to do what they are told to do.

Q. And do they continue working on the track until they are told a train is coming?

MR. MASON: That is objected to.

A. They are warned, when they go to work——

THE COURT: The question is what their instructions are.

By MR. DEMMING:

Q. We will use the word "instruction." What instructions do these section men get with regard to trains coming?

A. I told you about Mr. McGovern, they are told to be careful, to watch out for themselves, and depend upon the foreman, of course. Sure. That is what we pay the foreman for.

Q. And the watchman?

A. And the watchman; yes, sir.

Q. And if they get no word from the foreman or the watchman, they are compelled to work——

A. They are to look out for themselves. No man should continue working if he sees a train coming.

Q. We do not contend that for a moment.

A. Well, then.

Q. What were the weather conditions up there that morning?

A. When I left there?

Q. Yes.

A. Pretty bad. Very foggy. It was foggy and snowy. No trains passed right previous to my time there, but it was pretty bad.

Q. Pretty bad?

A. It was foggy, very difficult weather, yes.

Q. As a matter of fact, was not it practically impossible to see a train coming any distance away, without being told——

A. Not when I left there. You could see a train back as far as the curve, you could see it under the Seventeenth Street bridge when I left there, but down on the east side, at the

Pennsylvania Railroad bridge, down near Broad Street, you could not there.

Q. You don't know how the weather conditions were there after you left there?

A. I have an idea after the Norristown train went by it made it worse.

Q. You have an idea?

A. I have an idea.

Q. Your idea is it was pretty bad?

A. It was pretty bad when I left, and I don't guess it got any better.

HARRY N. DICKINSON, having been duly sworn, was examined and testified as follows:

By MR. MASON:

Q. You are a civil engineer employed by the defendant company, are you not?

A. Yes, sir.

Q. Did you make this plan (plan shown witness)?

A. I did; yes, sir.

Q. Will you tell me what there is on that plan that indicates the signal tower to the north of the Seventeenth Street bridge?

A. That is indicated by four lines which are colored inside in red and marked "signal tower."

Q. You had better call that pink. It is more pink than red.

A. Pink.

Q. What is there there that indicates Track No. 4?

A. Track No. 4 is indicated by two lines, marked "Track No. 4," and colored in between in pink.

Q. And what is there that indicates Track No. 2?

A. Track No. 2 is the next track, which is tinted green, marked as "Track No. 2."

Q. What is there that indicates Track No. 1?

A. Track No. 1 is the next track, which is colored in brown, and marked "Track No. 1."

Q. What is there that indicates Track No. 3?

A. Track No. 3 is the next one, which is colored in blue, and marked "Track No. 3."

Q. Will you indicate the measurement from the southern end of the signal tower to the crossover switches to the south?

A. There are two sets of crossover switches.

Q. The first set, measured along Track No. 2?

A. Track No. 2?

Q. Yes.

A. You mean the first set of switches?

Q. Yes, the first set of switches on Track No. 2.
A. Say from the beginning of the switches?
Q. The frog.
A. Eight hundred and fifteen feet.
Q. What is the distance from the southern end of the Seventeenth Street Bridge to the first frog you reach in going south on Track No. 2?
A. What side of the bridge?
Q. The south side of the bridge.
A. That is 192 feet from the south side of the signal tower to the south side of the Seventeenth Street bridge.
Q. What is the distance, I asked you, from the south side of Seventeenth Street bridge to the first frog you come to, coming south, on No. 2 track?
A. Six hundred and twenty-three feet.
Q. What is the scale of that plan?
A. Thirty feet to the inch.

CROSS-EXAMINED.

By MR. DEMMING:

Q. You say 623 feet from the bridge to the place where these tracks cross?
A. Yes, sir.
Q. You are giving all these distances by scaling off the plan, are you not?
A. Yes, sir.
Q. That is not nearly so accurate as measuring on the ground, is it?
A. The plan is accurate, and the scale is accurate.
Q. Your scale is accurate, but it is not nearly as accurate as if you would go and measure it right on the ground?
A. You can scale to the closest foot. You can scale to the foot on the plan.
Q. Did you make that plan yourself?
A. Yes, sir.
Q. What did you make it from?
A. Measurements I made on the ground.
Q. You made measurements?
A. Yes, sir.
Q. Then, why did you not give us the measurements, instead of scaling it off the plan? Have you got the measurements from which you made the plan there?
A. Not all of them; no, sir.
Q. Did you actually go out there with a transit and level and run them?
A. I was out there with a transit and tape, but no level.

Q. You say it was 815 feet from the tower to the cross tracks?

A. Yes, sir.

Q. Does that plan accurately show the radius of the curve of the New York tracks?

A. It shows the curve; yes, sir.

Q. Does it accurately depict the radius?

A. It shows the curvature of the track.

Q. It shows the track is curved?

A. Yes.

Q. Does it show the proper curvature?

A. It does; yes, sir.

Q. As far as it goes?

A. Yes, sir.

Q. It only goes part way round?

A. It only goes a little distance above the signal tower.

EDWARD F. HARRISON, having been duly sworn, was examined and testified as follows:

By MR. MASON:

Q. You are a photographer by profession employed by the Philadelphia and Reading Railroad at the present time?

A. Yes, sir.

Q. I show you pictures marked "McGovern versus Railway, A and B," and ask you whether you took them?

A. I did.

Q. Where was your camera at the time you took picture marked "A"?

A. On top of the Pennsylvania Railroad bridge.

Q. Looking how?

A. Looking north over the southbound local track from top of Pennsylvania Railroad bridge.

Q. And what does that show, in general terms, so far as the area of the tracks of the Reading Railway are concerned?

A. It shows the Sixteenth Street Junction, it shows the tracks in the vicinity of the Sixteenth Street Junction, where the main line tracks divide into the New York division.

Q. And picture marked "B" was taken where?

A. Picture marked "B" is looking south from Sixteenth Street signal tower, standing right out in front of the signal tower.

Q. The signal tower, which is north of the Seventeenth Street bridge?

A. Yes.

CROSS-EXAMINED.

By MR. DEMMING:

Q. When did you take them?

A. Photograph "B" was taken October 6, 1913, and photograph "A" was taken October 29, 1913.

Q. Were the conditions the same at that time as they were on December 24, 1912?

A. From my own personal knowledge they have not changed.

Q. You don't know, do you?

A. I am familiar with that location by passing there, by walking along there, and they were just the same, as far as I know.

MR. MASON: I offer the plan and the two photographs in evidence.

MR. DEMMING: I do not object.

(Defendant closes.)

FURTHER EVIDENCE ON BEHALF OF PLAINTIFF.

C. H. CORSON, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. What is your business?

A. Assistant timekeeper, Station B, United Gas Improvement Company.

Q. What gas plant?

A. Known as the Twenty-fifth Ward Gas Works.

Q. Will you turn to your books and tell us whether or not this man Peter McGovern was employed by your company in 1912?

A. When he was employed?

Q. Yes.

A. Employed 8-16-1912.

Q. He was employed from when to when?

A. From 8-16-1912 to 11-4-1912.

Q. That is, from August?

A. From August 16 to November 4.

Q. From August 16 to November 4, 1912?

A. Yes, sir.

Q. Just turn to your books and tell us what time he made and what he was paid.

A. There are quite a number of entries.

Q. You paid him by the hour?

A. He was known as a laborer. Eighteen cents an hour.

While he worked in other capacities, classified positions, he was paid that rate of pay.

Q. Eighteen cents an hour?

A. Yes.

Q. How many hours a day did he work?

A. At that time of the year they worked fifty-four hours a week.

By MR. MASON:

Q. You have not got how much he made while he was there?

MR. DEMMING: That is a question of multiplication.

MR. MASON: No, it is not, because you don't know how long he worked.

By MR. MASON:

Q. How much did you pay him while he was there?

A. Do you want the total amount?

Q. Yes.

A. It will take me fifteen or twenty minutes to get that.

Q. Don't give it to us, then. Do you know of your own knowledge whether he worked full time during the whole time he was there?

A. As the average laborer worked, yes.

Q. Do you know whether this man got full time?

A. He did, yes.

Q. How do you know that?

A. The figures there.

Q. Does that show he worked the full fifty-four hours each week for each of the weeks he was there?

A. I would not swear to every day; no, sir.

Q. But we have got to have it accurately. Can't you tell us? Didn't you go over these books yourself?

A. I did not have time. I was sent down here.

By MR. DEMMING:

Q. Turn to the books. You can turn to the books?

A. I can.

MR. DEMMING: We have got the books here, if you insist.

By MR. MASON:

Q. Go to the place where he started to work, August 16, and tell us how many hours he made the first week.

By THE COURT:

Q. How long will it take you to find that in the books?

A. Fifteen or twenty minutes to get all those different numbers.

(At 12.35 P. M. court took a recess until 1.30 P. M.)

1.30 P. M.

Present: Parties as before noted.

C. H. CORSON, recalled.

By MR. DEMMING:

Q. During the recess of court have you gone over your books?

A. Yes.

Q. And computed the wages made by Mr. Peter McGovern?

A. Yes, I have a copy of the amount of wages made by McGovern here.

Q. You say he went to work on the sixteenth of August, do you?

A. The sixteenth of August, 1912.

Q. What did he earn during August from the U. G. I. Co.?

A. From August 16 to 31st, inclusive, $23.40.

Q. What did he earn during the entire month of September?

A. I will have to give it to you by periods.

Q. You have got it in two periods of two weeks here?

A. Yes. From 9-1 to 9-15 inclusive, $30.42. From 9-16 to 9-30 inclusive, $18.08.

Q. That is a total of $48.50?

A. $48.50, yes.

Q. What did he earn during the month of October?

A. From October 1 to October 15 inclusive, $17.46, and from October 16 to October 31 inclusive, $19.77.

Q. A total of $37.23?

A. Yes.

Q. What did he earn during the month of November up to the time he left?

A. $5.19.

(No cross-examination.)

MR. DEMMING: In view of the admission made by the defendant here of the earnings of this dead man while he was employed by them, some of these figures will have to be added together to get his total earnings. That is to say, I have performed the addition here, and I have no doubt it is correct. From the time he was employed in July up to the end of July by the defendant company he earned a total of $12.72. He was employed the latter part of July. During the entire month of August that he worked for the Reading Railway Company he earned $17.17, and during the period in August which he worked for the U. G. I. Company he earned $23.40, or a total of $40.57 for the entire month. During the entire month of September, in which he worked for the U. G. I. Com-

pany, he earned $48.50. During the entire month of October, during which time he worked also for the U. G. I. Company, he earned a total of $37.23. During the month of November, the fore-part of November, during which time he worked for the U. G. I., he earned $5.19, and during the remainder of November he worked for the Reading Railway Company and earned $28.90, or a total earnings for the entire month of November of $34.09, and during the month of December up to the time that he was killed, December 24, 1912, he earned up to December 24, 1912, $33.66.

I also offer in evidence this photograph which has been identified of the dead man.

I believe I have already offered in evidence the letters of administration taken out by this young lady.

(Plaintiff closes.)

MR. MASON: I ask permission to call Miss McGovern for further cross-examination to cover one point, and if I can get from her what I need, I won't have to call another witness.

BRIDGET MCGOVERN, recalled.

MR. DEMMING: I know what my friend wants to show, but in order to get this straight on the record, I think I will ask for an offer, so that your Honor can pass upon it.

MR. MASON: I offer to prove as part of the defendant's case, by this witness in cross-examination, of the plaintiff herself, and by corroboration if necessary, in case her testimony cannot go far enough, that after the death of her brother, who was an employee at the time of his death of the defendant company, she called at the office of the Claim Department of the defendant, and asked to have the funeral expenses paid by the railroad company, presenting an undertaker's bill of $233.38, and that she was assured that the funeral expenses would be paid, and I will prove as a matter of fact they were paid by the defendant company, as an element in set-off in this case.

MR. DEMMING: That offer is objected to, first, because there has been no attempt made by the plaintiff in this case to recover any expenses for funeral expenses, medical attendance, or anything of that sort, and second, because such an offer, such proof, even if made, would not be an offset to the plaintiff's claim in this case.

THE COURT: Do you offer it under a section of the statute which allows as a set-off an amount which has been paid?

MR. MASON: Yes, sir; that is my theory. My theory is whether it is a statutory provision or otherwise, it seems to me that if the defendant company at the request of this plaintiff paid a sum which she as administratrix would be liable for, and now the defendant is to be sued on the theory that it was liable to pay a further sum at the time that payment was made, we are entitled to have that set-off in this case, rather than go to the security that the law would otherwise force us to of recovering it in some other cause of action. It seems to me, because he was an employee we paid the funeral expenses amounting to $233.38, that we ought to be entitled to that as a set-off, if there is to be any recovery at all.

THE COURT: You have not offered to prove that it was paid to any insurance relief benefit.

MR. MASON: No, it was paid to the undertaker.

THE COURT: Then, I will sustain the objection, and grant you an exception.

(Exception noted for defendant, by direction of the court.)

(Testimony closed.)

CHARGE OF THE COURT.

HON. J. WHITAKER THOMPSON, J.:

Gentlemen of the Jury: In this case the suit is brought by the administratrix of the young man who was killed, for the benefit of his father and mother, who are residents of Ireland. They are non-residents and aliens, not naturalized citizens or not residents of this country, and the Act of Congress under which this suit is brought is, in my judgment of the law, intended for the benefit only of such relatives of a deceased employee of a carrier in interstate commerce as are residents of this country. This case was tried before. That being the case, I will affirm the defendant's third and fourth points. The first and second points submitted by the defendant are declined.

The third point submitted by the defendants is affirmed and reads:

"3. The evidence in this case, which is uncontradicted, shows that the parents of the decedent, to wit, Patrick McGovern and Bridget McGovern, for whose benefit this action is brought under the Act of Congress of April 22, 1908, as amended April 5, 1910, are non-resident aliens, being citizens of and

residents in Great Britain, and therefore they have no right under the Act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant."

I affirm that point. That is entirely a question of law in this case.

The fourth point submitted by the defendant is affirmed and reads:

"4. Under all the evidence in this case, the verdict should be for the defendant."

I affirm that point, and I direct a verdict for the defendant in this case.

MR. DEMMING: Will your Honor grant me an exception?

THE COURT: Yes. You may have an exception.

(Exception noted for plaintiff by direction of the court.)

MR. DEMMING: As I understand, your Honor decides that this court will not take jurisdiction of this case, because the parties for whose benefit this suit is brought are non-resident aliens?

THE COURT: I think that is the point I affirmed, isn't it, Mr. Demming?

MR. DEMMING: Yes, sir. That is, as I understand it. To which your Honor grants me an exception?

THE COURT: I granted you an exception to the points which I have affirmed.

MR. MASON: Your Honor will grant me an exception to your declination to charge as requested in the first and second points of the defendant?

THE COURT: Yes.

Exception noted for defendant to the declination by the learned judge to charge as requested in the first and second points submitted on behalf of the defendant, as follows:

"1. The evidence in this case shows that the parents of Peter McGovern, the decedent, for whose death this suit was brought, were neither of them dependent upon their son for maintenance and support at the time of his death, and as the provisions of the Act of Congress of April 22, 1908, as amended April 5, 1910, limit the recovery in such cases to the actual pecuniary loss suffered by dependent relatives, there is no proof in this case which brings the parents of this decedent within that class, and as the plaintiff has failed to prove the damages for which recovery is provided by the Act of Congress, your verdict must be for the defendant.

"2. It appears that at the time the plaintiff's decedent entered upon the work of cleaning snow from the tracks of the

defendant company he knew that trains were running upon those tracks and were likely to continue to run during the time that he was working there, and the fact that the snow and steam and smoke from passing trains obscured the view of coming trains increased the risk of his position. This risk was obvious to him, so that by continuing to work in a dangerous position, with full knowledge of all the circumstances he assumed the risk incident to such employment, and as he would not be entitled to recover from this defendant if he were alive and suing for injuries, therefore the present plaintiff, who is his administratrix, would not be entitled to recover for the same reason."

The jury rendered a verdict for the defendant.

And thereupon, the counsel for the said plaintiff did then and there except to the aforesaid direction of the said court to find a verdict for the defendant, and inasmuch as the said direction, so excepted to, does not appear upon the record:

The said counsel for the said plaintiff did then and there tender this bill of exceptions to the direction and opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge at the request of the said counsel for the plaintiff did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this nineteenth day of February, 1914.

J. W. THOMPSON, (Seal)
District Judge.

OPINION.

UPON MOTION FOR NEW TRIAL AND FOR JUDGMENT N. O. V.
(Filed January 7, 1914.)

THOMPSON, J.:

The plaintiff brought suit as administratrix of Peter McGovern, deceased, against the Philadelphia and Reading Railway Company under the provisions of the Act of April 22, 1908, known as the Employers' Liability Act, and its amendment, to recover damages for the death of Peter McGovern. The action is alleged in the statement of claim to be for the benefit of Patrick McGovern and Bridget McGovern, the surviving parents of the deceased.

At the trial it appeared that Patrick McGovern, the father, and Bridget McGovern, the mother, of the decedent, for whose benefit action was brought, are citizens of the Kingdom of Great Britain and Ireland and residents of Ireland. At the conclusion of the plaintiff's testimony, the defendant submitted *inter alia* the following point for charge, which was refused by the court:

"3. The evidence in this case, which is uncontradicted, shows that the parents of the decedent, to wit, Patrick McGovern and Bridget McGovern, for whose benefit this action is brought under the Act of Congress of April 22, 1908, as amended April 5, 1910, are non-resident aliens, being citizens of and residents in Great Britain, and therefore they have no right under the said Act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant."

The refusal of the above point is assigned as error and reason for a new trial. The Act, under which the suit is brought, establishes a new liability upon common carriers engaged in interstate commerce by which in case of the death of an employee under the circumstances of negligence set out in the Act, the carrier is liable to damages "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."

Under the Pennsylvania Statute of April 26, 1855, P. L. 309, permitting certain named relatives to recover damages for death occurring through negligence, it has been held that a non-resident alien has no standing to maintain such an action against a citizen of Pennsylvania. As was stated by Mr. Justice McCollum, in the case of Deni v. Pennsylvania Railroad Company, 181 Pa. 525:

"Our statute was not intended to confer upon non-resident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include non-resident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it. A non-resident defendant is not entitled to the benefit of our exemption laws, although the language of these laws may admit of a construction which would include him. It has been so held in a number of our cases. In this connection the language of Mr. Justice Sterrett, in Col-

lom's Appeal, 2 Pennypacker, 130, is pertinent. In delivering the opinion of the court he said: 'While non-resident debtors may perhaps be within the letter of the Act we do not think they are within its spirit. As was said by Mr. Justice Woodward in Yelverton v. Burton, 2 Casey, 351, and afterwards quoted approvingly by the present Chief Justice in McCarthy's Appeal, 18 P. F. Smith, 217, we do not legislate for men beyond our jurisdiction.' In one respect, at least, our Act of 1855 resembles our exemption laws. It is intended, primarily, for the benefit of the family of which the deceased was a member.

. . . . . .

"We have a number of statutes which expressly confer rights upon aliens, but none which confers them by implication or inference. When the legislature intends to concede to non-resident aliens the rights which our own citizens have under and by virtue of the Act of April 26, 1855, it will say so."

The Deni case was followed in the case of Maiorano v. Baltimore & Ohio Railroad Company, 216 Pa. 402, where it appeared that the plaintiff was a resident of the Kingdom of Italy and a subject of the King of Italy, and it was claimed that under the treaty between the United States and Italy, the plaintiff was entitled to the same rights as citizens of the United States. Act 3 of the treaty provides:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting to the conditions imposed upon the natives."

It was held by the Supreme Court of Pennsylvania that the provisions in the treaty above referred to apply only to such citizens of Italy, as either with respect to their persons or property, are within the jurisdiction of the United States, and that the Act of 1855 did not entitle an alien non-resident to sue.

The decision in Deni v. Pennsylvania Railroad Company was followed by the Circuit Court of Appeals for this circuit in the case of Fulco v. Schuylkill Stone Co., 169 Fed. 98, and by the Circuit Court of the District of Colorado in the case of Brannigan v. Union Gold Mining Company, 93 Fed. 164. The Circuit Court for the District of Washington in the case of Roberts v. Great Northern Ry. Co., 161 Fed. 239, in interpreting a statute of the State of Washington, arrived at the same conclusion. The case of Maiorano v. Baltimore & Ohio Railroad Company was taken on error to the Supreme Court

of the United States. Mr. Justice Moody, in rendering the opinion of the court, 213 U. S. 268, held that the construction of the state statute by the highest court of the State must be accepted by the Federal Supreme Court. He further decided, however, that a fair construction of the treaty between the United States and the King of Italy, under which the plaintiff claimed, did not confer upon a non-resident citizen of Italy the rights bestowed upon citizens to maintain actions of this sort. In concluding, Mr. Justice Moody said:

"If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of action for himself or his personal representatives to safeguard the protection, and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety."

While the right of a non-resident alien to recover under the Federal Employers' Liability Act has not been passed upon, I think the reasoning in the cases of Deni v. Railway Company and of Maiorano v. Baltimore & Ohio Railroad Company may well be applied to the statute in question. It is not to be presumed that Congress intended to legislate for the benefit of persons residing out of the jurisdiction of the State and Federal laws. The right to recover damages for death is not a right at common law and when Congress undertakes to impose a liability upon interstate carriers for the benefit of their employees and the relatives of their employees in case of death through the carriers' negligence, in the absence of any provision to the contrary in a treaty or Act of Congress, it must be presumed that such benefits are not intended for non-resident aliens.

Counsel for the plaintiff calls attention to the treaty with Italy signed at Washington on February 25, 1913, under which the citizens of Italy are said to be entitled to exactly the same rights as the citizens of this country in the courts of this country, although at the time of the occurrence, the citizens of Italy may be residing abroad. It is urged that under the most favored nation clause in the treaties between this country and Great Britain and Ireland, the latter countries are entitled to the benefits and the rights arising under this treaty with Italy. Even if citizens of Great Britain derive the benefits claimed under the late treaty with Italy, that circumstance has no bearing on the question for whatever rights the plaintiffs have in this case arose prior to the adoption of the treaty with Italy, as the death is alleged to have occurred on December 24, 1912.

It is concluded that the action cannot be maintained for the benefit of the parents of the deceased and that the defendant's request for binding instructions should have been granted.

A new trial is therefore ordered. Defendant's motion for judgment n. o. v. is overruled.

MOTION WAIVING NEW TRIAL, ETC.

(Filed January 23, 1914.)

And now, this, the twenty-second day of January, 1914, Bridget McGovern, the above plaintiff, through her counsel, George Demming, Esq., the District Court having handed down a decision granting and ordering a new trial in the above case, and stating in said decision as follows: "It is concluded that the action cannot be maintained for the benefit of the parents of the deceased and that the defendant's request for binding instructions should have been granted," hereby moves the court to enter judgment as matter of law upon said point in favor of the defendant, and to grant her an exception thereto, in order that said plaintiff may be saved the trouble and expense of another and second trial, and in order that she may be able to appeal from said order and direction of said court directly to the Supreme Court of the United States upon the question of jurisdiction, and for this purpose said plaintiff hereby concedes that at any new trial of said action the evidence on behalf of herself and the parties whom she represents would be identical to that produced at the first trial with regard to the residence of the parties whom she represents and for whose benefit she brought said action, and she hereby concedes that the residence and domicile of said parties, viz.: Patrick McGovern and Bridget McGovern, the parents of Peter McGovern, deceased, is, and has been heretofore, Ireland, United Kingdom of Great Britain, and said plaintiff hereby formally and explicitly waives any right she may have under the law to a new trial by reason of said fact of residence of said parents being proved and shown by the evidence and by reason of a jury finding, or having found, such to be the fact from the evidence produced by her at said first or former trial of this action.

GEORGE DEMMING,
Attorney for Bridget McGovern, Administratrix.

And now, January 23, 1914, motion refused; exception for plaintiff.

J. W. THOMPSON,
District Judge.

PRAECIPE FOR JUDGMENT.

(Filed February 24, 1914.)

To Clerk, U. S. D. C.,

Enter judgment upon the verdict in the above case in favor of the defendant and against the plaintiff.

WM. CLARKE MASON,
Pro Defendant.
2/24/1914.

JUDGMENT.

Before THOMPSON, J.

And now this twenty-fourth day of February, 1914, in accordance with praecipe filed judgment is hereby entered on the verdict in the above entitled case in favor of the defendant and against the plaintiff.

Attest:

LEO A. LILLY,
Deputy Clerk.

CERTIFICATE OF JUDGE THAT THE QUESTION OF THE JURISDICTION OF THE COURT IS IN ISSUE IN THIS CAUSE, AND CERTIFYING SAID QUESTION OF JURISDICTION TO THE SUPREME COURT OF THE UNITED STATES.

(Filed February 25, 1914.)

This cause, having been duly put at issue, came on to be tried before this court and jury duly impaneled on February 9 and 10, 1914, and witnesses and evidence were duly presented on behalf of the plaintiff as well as of the defendant. Whereupon, at the conclusion of the entire case, this court directed that a verdict be entered in favor of the defendant and against the plaintiff in the case, and that the jury be dismissed from further consideration of the case, upon the sole ground that this court could not take jurisdiction of the case and the jury should not be allowed to consider and pass upon the case and the evidence thereof because the evidence produced at the trial of the said case in behalf of the plaintiff disclosed that the parties for whose benefit said suit was brought and who would profit by any recovery by the plaintiff in said suit were non-resident aliens and residents and citizens of a country other than the United States of America. Accordingly the jury was directed to enter a verdict in favor of the defendant in said

suit, and against the plaintiff, to which direction of this court counsel for plaintiff was allowed an exception. Judgment upon the said verdict was duly entered in favor of the defendant.

This court, therefore, hereby certifies to the Supreme Court of the United States solely the question as to whether this court has jurisdiction in the present case as a Federal Court by reason of the fact that the parties represented by the plaintiff and for whose benefit and on whose behalf said suit was brought are non-resident aliens and residents and citizens of a country other than the United States of America, and whether the provisions and remedies of the Railroad Employers' Liability Acts of Congress, approved April 22, 1908, and April 5, 1910, cover, include and permit a recovery thereunder by non-resident aliens and residents and citizens of countries other than the United States of America.

This certificate is made conformably to the Act of Congress of March 3, 1891, Chapter 517, and, upon an appeal being taken by the plaintiff to the Supreme Court of the United States, all the pleadings, the bill of exceptions, the opinion by this court granting a new trial upon the motion of the defendant after the first trial, the application of plaintiff asking that this order of this court granting a new trial be changed to ordering entering judgment non obstante veredicto for the defendant because said order was based upon the finding of the jury of undisputed testimony, the refusal of this court so to do and the granting of an exception to plaintiff therefor, the final judgment entered in the case, and this certificate will be certified and sent up as part of the proceedings.

J. W. THOMPSON,
Judge.

February 25, 1914.

Approved as to form.
WM. CLARKE MASON,
Attorney pro Defendant.

ASSIGNMENTS OF ERROR.

(Filed February 25, 1914.)

And now comes Bridget McGovern, administratrix, plaintiff in error, and makes and files these, her assignments of error:

1. The District Court of the United States for the Eastern District of Pennsylvania erred in affirming defendant's third point at the trial of the above case, as follows: "The evidence in this case, which is uncontradicted, shows that the parents

of the decedent, to wit, Patrick McGovern and Bridget McGovern, for whose benefit this action is brought under the Act of Congress of April 22, 1908, as amended April 5, 1910, are non-resident aliens, being citizens of and residents in Great Britain, and therefore they have no right under the said Act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant."

2. The District Court of the United States for the Eastern District of Pennsylvania erred in affirming defendant's fourth point at the trial of the above case, as follows: "Under all the evidence in this case, the verdict should be for the defendant."

3. The District Court of the United States for the Eastern District of Pennsylvania erred in directing the jury to render a verdict in favor of the defendant at the trial of the above case.

4. The District Court of the United States for the Eastern District of Pennsylvania erred in holding at the trial of the above case that non-resident aliens and residents and citizens of a country other than the United States of America could not recover under the provisions of the Railroad Employers' Liability Acts of Congress, approved April 22, 1908, and April 5, 1910, and that such residents and citizens of countries other than the United States of America are not entitled to the benefits and remedies of said Acts.

5. The District Court of the United States for the Eastern District of Pennsylvania erred in holding that a citizen and resident of the United Kingdom of Great Britain and Ireland is not entitled to recover under the provisions and remedies of the Railroad Employers' Liability Act of Congress, approved April 22, 1908, as amended April 5, 1910, the same as a citizen and resident of the United States of America, by reason of the terms and provisions of the existing treaties in force between the United States of America and the United Kingdom of Great Britain and Ireland, and also by reason of these treaties taken in connection with the treaties in force and effect between the United States of America and other countries.

6. The District Court of the United States for the Eastern District of Pennsylvania erred in not changing its order directing a new trial in the above case to an order entering judgment in favor of the defendant non obstante veredicto, after the first trial, when said order was based upon the finding of the jury of a fact from undisputed and essential evidence presented by plaintiff herself at the trial, which evidence was the

foundation of plaintiff's whole case, and plaintiff was willing to stipulate that this evidence would necessarily be the same at any new or subsequent trial, and plaintiff was willing to waive any rights she might have had to a new trial because of the language in said order of said District Court ordering a new trial.

7. The District Court of the United States for the Eastern District of Pennsylvania erred in refusing to take jurisdiction of the case because the parties benefited by any recovery are non-resident aliens.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

PETITION FOR WRIT OF ERROR.

(Filed February 25, 1914.)

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Bridget McGovern, administratrix, the above plaintiff in error, feeling herself aggrieved by the final judgment entered against her in the above-entitled case on the twenty-fourth day of February, 1914, by the District Court of the United States for the Eastern District of Pennsylvania, and which judgment was entered in favor of the Philadelphia and Reading Railway Company, defendant in error, comes now by her attorney, George Demming, Esq., and shows that the above action was begun in the District Court of the United States for the Eastern District of Pennsylvania, that the jurisdiction of the said District Court was not entirely dependent upon the opposite parties to the suit being citizens of different States, but that the suit arose under laws of the United States and the interpretation and application thereof, and that the said suit was decided against your petitioner, plaintiff in error and plaintiff below, and judgment entered against your petitioner and in favor of the Philadelphia and Reading Railway Company, defendant in error and defendant below, as aforesaid, upon the sole ground that the said District Court of the United States for the Eastern District of Pennsylvania could not and would not take jurisdiction of the said case, and said District Court refused to take jurisdiction of the said suit for the reason that the said District Court decided and held that the parties at interest and for whose benefit and on whose behalf your petitioner as plaintiff brought and maintained said suit, being non-resident aliens and residents and

citizens of a country other than the United States of America, could not and should not, and should not be allowed to, recover a verdict and judgment under the provisions and remedies of the Acts of Congress approved April 22, 1908, and April 5, 1910, and generally known and called the Railroad Employers' Liability Acts of Congress; and of said fact that the question of the jurisdiction of the said District Court of the United States for the Eastern District of Pennsylvania was at issue in this cause the judge of said District Court has filed a certificate, certifying said question of jurisdiction to the Supreme Court of the United States; and that your petitioner is therefore entitled to a writ of error out of the Supreme Court of the United States in accordance with the Act of Congress in such cases made and provided, entitled the Judicial Code.

Your petitioner, therefore, prays that a writ of error may be allowed to the Supreme Court of the United States, and also that an oder be made fixing the amount of the security for costs which the plaintiff in error shall give and furnish upon said writ of error, and that, upon giving said security, all further proceedings in said District Court be suspended and stayed until the final determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray, etc.

BRIDGET McGOVERN,
Administratrix.

By Her Attorney,
GEORGE DEMMING.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

Bridget McGovern, being duly sworn according to law, deposes and says that she is the plaintiff in error in the foregoing case and petition, that the statements contained in the petition are true, and that the writ of error therein prayed for is not taken out for the purpose of delay but because she feels that an injustice has been done her and the parties she represents by reason of said judgment.

Sworn and subscribed to before me the 25th day of February, 1914. } BRIDGET McGOVERN.

EVAN B. LEWIS,

(Seal) *Notary Public.*

Commission expires January 22, 1917.

February 25, 1914.

Petition allowed upon the entering of a bond in the sum of two hundred and fifty dollars.

J. W. THOMPSON,
District Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *sct.:*

I, William W. Craig, clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of the pleas and proceedings in the case of Bridget McGovern, administratrix of the estate of Peter McGovern, deceased, v. Philadelphia and Reading Rwy. Co., No. 2580, June Session, 1913, as per certificate filed, a copy of which is hereto annexed, now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this twenty-fourth day of
(Seal) March, in the year of our Lord one thousand, nine hundred and fourteen, and in the one hundred and thirty-eighth year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

/3

Office Supreme Court, U. S.
FILED
APR 6 1914
JAMES D. MAHER

No. 430 October Term, 1913.

IN THE

Supreme Court of the United States.

BRIDGET McGOVERN, Administratrix of the Estate of PETER McGOVERN, Deceased,

Plaintiff in Error and Plaintiff Below,

v.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania,

Defendant in Error and Defendant Below.

Writ of Error to the District Court of the United States for the Eastern District of Pennsylvania.

MOTION TO ADVANCE.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

International, 236 Chestnut St.

IN THE

Supreme Court of the United States.

October Term, 1913. **No. 993.**

BRIDGET McGOVERN, ADMINISTRATRIX OF THE ESTATE OF PETER McGOVERN, DECEASED,
Plaintiff in Error and Plaintiff Below,

v.

PHILADELPHIA AND READING RAILWAY COMPANY, A CORPORATION OF THE STATE OF PENNSYLVANIA,
Defendant in Error and Defendant Below.

WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

To the Honorable the Justices of the Supreme Court of the United States:

The plaintiff in error, Bridget McGovern, hereby respectfully shows:

1. That on or about June 16, 1913, plaintiff in error as administratrix began a suit at law in the District Court of the United States for the Eastern District of Pennsylvania, against the Philadelphia and Reading Railway Company, the defendant in error, to recover damages for the death of Peter McGovern.

2. Said suit was of June Session, 1913, No. 2580, and was brought under the Act of Congress of April 22, 1908, known as the Railroad Employers' Liability Act, and its Amendment of April 5, 1910.

3. Plaintiff in error was duly appointed administratrix of the estate of said Peter McGovern, deceased, by the properly constituted authorities of the State of Pennsylvania before she brought said suit, viz., on April 10, 1913.

4. The facts by reason of which said suit was brought, as shown by the statement of claim and as developed at the trial, briefly are as follows:

Plaintiff's intestate, Peter McGovern, had been employed by defendant in error as a laborer or section hand off and on for about eighteen months. On December 24, 1912, about nine o'clock A. M., as said Peter McGovern was working, together with the other members of his gang of section men, on and about the tracks and roadbed of said defendant in error, used by it in its interstate and foreign commerce in the environs of Philadelphia, Pennsylvania, without any notice, signal or warning whatsoever, and without any negligence on his part, he was run down and instantly killed by a train belonging to and controlled by defendant in error bearing interstate traffic.

5. Said Peter McGovern was about twenty-four years of age, single, and the partial support of his indigent parents, Patrick McGovern and Bridget McGovern, living in Ireland, who were the next of kin.

6. At the trial of the cause on November 10 and 11, 1913, a verdict in favor of the plaintiff in error was rendered in the sum of seven hundred and fifty dollars, apportioned in equal amounts between these two parents.

7. Motions for a new trial and for judgment *non obstante veredicto* were filed by defendant in error. After argument a new trial was ordered on the written opinion by the district trial judge, stating that defendant in error's motion at the trial for binding instructions in favor of defendant in error should have been granted because the beneficiaries of the suit were shown to be non-resident aliens.

8. At the second trial on February 9, 1914, after the same evidence for both sides had been presented as at the first trial, the same trial judge directed the jury to bring in a verdict in favor of the defendant in accordance with his opinion granting the new trial.

9. Said District Court refused to entertain jurisdiction of the case, and ordered judgment for defendant in error on the ground that as the beneficiaries of any recovery in the case would be non-resident aliens, said Act of April 22, 1908, did not apply.

10. Plaintiff in error thereupon took out a writ of error from the judgment of said District Court to the Supreme Court of the United States on said question of jurisdiction, which is certified to by the judge of said District Court, and also because there is the right of direct appeal on the construction of certain treaty rights involved in said case.

11. Plaintiff in error begs permission to call the attention of this court to the fact that the question upon which her case turned in the lower court, i. e., whether or not a non-resident alien can benefit by reason of the provisions of the Act of April 22, 1908, is not only of importance to herself, but is of general and nation-wide interest, and should be finally determined as quickly as possible, as this same question is now pending and unsettled, according to the information of

plaintiff in error, in several of the districts of the Federal courts.

Plaintiff in error through her attorney, George Demming, Esq., comes now, therefore, this the sixth day of April, 1914, and moves this court to advance her case for argument to such early date as may be convenient to the court, either in accordance with Rule No. 32, as the briefs for plaintiff in error are now on file, or by placing the same on the next summary docket.

GEORGE DEMMING,
Attorney for Bridget McGovern,
Plaintiff in Error.

Office Supreme Court, U. S.
FILED
APR 6 1914
JAMES D. MAHER
CLERK

14

No. [redacted]430 October Term, 1913.

IN THE

Supreme Court of the United States.

BRIDGET McGOVERN, Administratrix of the Estate of PETER McGOVERN, Deceased,

Plaintiff in Error and Plaintiff Below,

v.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania,

Defendant in Error and Defendant Below.

Writ of Error to the District Court of the United States for the Eastern District of Pennsylvania.

Brief for Plaintiff in Error.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

International, 236 Chestnut St.

INDEX.

	Page
Names of the Parties	1
Nature of the Proceedings	1
Statement of the Case	2
Presenting succinctly the question involved and the manner in which it was raised	2
Specification of the Errors relied on	5
Argument	7
The Maiorano decision entitles plaintiff to recover	8
Plaintiff should be allowed to recover under the Treaties between this Country and Great Britain and Ireland, as well as the Treaty between this Country and Italy	13
By the law of comity plaintiff is entitled to recover	23
Plaintiff can recover under the plain terms of the Act of April 22, 1908, itself	28
The settled policy of this Country is to allow non-resident foreigners the equal protection of its laws	38
The decision of Slocum v. New York Life Insurance Co. was misinterpreted in the present case	43

ALPHABETICAL LIST OF ALL CASES AND AUTHORITIES REFERRED TO, TOGETHER WITH REFERENCES TO PAGES WHERE CITED:

	Page
Acts of Congress of April 22, 1908, and April 5, 1910 .....8, 15, 29,	37
Act of Congress of March 3, 1891	7
Act of Pennsylvania Legislature of June 7, 1911 (P. L. 678)	11
Amistad, The, 15 Pet. 518, etc.	15
Alfson v. Bush Co., 182 N. Y. 393	33
Ann Mulhall v. John Fallon, 176 Mass. 266	32
Atchison, T. & S. F. R. Co. v. Fajardo, 74 Kan. 314	33
Attorney General of United States 39, 40,	41
Augusta Rwy. Co. v. Glover, 92 Ga. 132	33
Adams v. British & F. S. S. Co., 2 Q. B. 430	33
American R. R. Co. of Porto Rico v. Birch, 224 U. S. 547	42
Batt Refrigerating Co. v. Sulzberger, 157 U. S. 1	30
Barrow Steamship Co. v. Kane, 170 U. S. 100	40
Barney v. Schneider, 9 Wall. 248	45
Baylis v. Travelers' Ins. Co., 113 U. S. 316	45
Baird and Co., Ltd., v. Savage, 43 Scottish Law Rep. 300	26
Bank v. Earle, 13 Pet. 519	24
Boudinot (Cherokee Tobacco) v. United States, 11 Wall. 616	30
Boothron v. Phoenix Light & Fuel Co., 8 Ariz. 129	33
Baltimore & Ohio R. R. Co. v. Baldwin, 144 Fed. 53	9
Breedlove v. Nicolet, 7 Pet. 413	40
Boyd on Workmen's Compensation 32,	34
Bradbury's Workmen's Compensation	31
Butterworth's Workmen's Compensation Cases	26
Butler's The Treaty-making Power of the United States	23
Blythe v. Hinckley, 180 U. S. 333	22
Battishell v. Humphreys, 64 Mich. 494	21
Brannigan v. Union Gold Mining Co., 93 Fed. 164	9
Cetofonte v. Camden Coke Co., 78 N. J. 662	34

ALPHABETICAL LIST OF CASES—(Continued).

	Page
Cherokee Tobacco v. United States, 11 Wall. 616	30
Chesapeake, etc., Co., v. Higgins, 85 Tenn. 620	33
Crashley v. Press Pub. Co., 179 N. Y. 27	40
Cleveland C. C. & St. L. R. R. Co. v. Osgood, 36 Ind. App. 34	33
Cushing, Hon. Caleb	39
Chambers v. Balt. & Ohio R. R. Co., 207 U. S. 142	20
Chew Heong v. U. S., 112 U. S. 536	19
Cyc., Vol. 32, Page 669	21
Davidsson v. Hill, 70 L. J., K. B. 788	26
Davidson v. Hill, 2 K. B. 606	25, 33
Dennich v. Railroad Co., 103 U. S. 11	35
Dewitt v. Buchanan, 54 Barb. (N. Y.) 31	40
De Geofrey v. Riggs, 133 U. S. 258	19
Deni v. Penna. R. R. Co., 181 Pa. 525	9
Ekin, Nishimura v. United States, 142 U. S. 651	23
Elliott, Adshead, on Workmen's Compensation Act	25
Endlich on Interpretation of Statutes	29
Employers' Liability and Workmen's Compensation, by Ruegg	25
Employers' Liability Act of England	25
Federal Employers' Liability and Safety Appliance Acts, by Thornton	34
Fulco v. Schuylkill Stone Co., 163 Fed. 124	9
Fong Yue Ting v. United States, 149 U. S. 698	42
Favored Nation Treatment, by Herod	20
"Fatal Accidents Act"	25
Gardner v. Thomas, 14 Johnson (N. Y.) 134	40
Giles v. Harris, 189 U. S. 475	7
Hall's International Law	20
Hauenstein v. Lynham, 100 U. S. 483	19, 22
Habana, Paquette, 175 U. S. 677	24
Hodges v. Easton, 106 U. S. 408	45
Hon. Caleb Cushing	39
Hon. Henry Stanbery	41
Hon. Richard Rush	40

ALPHABETICAL LIST OF CASES—(Continued).

	Page
Hilton v. Guyot, 159 U. S. 113	23
Herod on Favored Nation Treatment	20
Illinois Law Review	44
In re Ross, 140 U. S. 453	15
Interpretation of Statutes, by Endlich	29
Jeffersonville, etc., Co., v. Hendricks, 41 Ind. 48	33
Kellyville Coal Co. v. Petraytis, 195 Ill. 215	32
Krzus, Mike, v. Crow's Nest Pass Coal Co., Ltd., Law Reports, Appeal Cases, 590	26
Lake County v. Rollins, 130 U. S. 662	30
Law of Personal Property, by Joshua Williams	21
Lord Campbell's Act of 1846	25
Love v. United States, 29 Ct. of Claims, 332	23
Luke v. Calhoun Co., 52 Ala. 115	33
Low Wah Suey v. Backus, 225 U. S. 460	34
Maiorano v. Balt. & Ohio R. R. Co., 213 U. S. 268, and 216 Pa. 402	9, 12, 19, 20
Mich. Central R. R. Co. v. Vreeland, 227 U. S. 59	22, 42
McEwan v. Zimmer, 38 Mich. 765	23
McLean v. McLellan, 10 Pet. 625	22
Mike Krzus v. Crow's Nest Pass Coal Co., Ltd., Law Reports, Appeal Cases, 590	26
McMillan v. Spider Lake Saw Mill & Lumber Co., 115 Wis. 332	32
New Trials and the Seventh Amendment, by Prof. Henry Schofield,	44
Nichols Lumber Co. v. Franson, 203 U. S. 278	7
Nishimura, Ekiu, v. United States, 142 U. S. 651	23
Odwin v. Forbes	24
Opinions of Attorney General of United States	39, 40, 41
Patek v. American Smelting & Refining Co., 154 Fed. 190	34
Paquette Habana, 175 U. S. 677	24
Personal Property, 32 Cyc. 669	21
Personal Property, by James Schouler	21
Personal Property, Law of, by Joshua Williams	21
Power v. Harlow, 57 Mich. 107	21

ALPHABETICAL LIST OF CASES—(Continued).

	Page
Pocohontas Collieries Co. v. Rukas, Adm., 104 Va. 278	33
Pittsburgh, C. C. & St. L. R. Co. v. Naylor, Adm., 73 Ohio St. 115,	33
Philpott v. Missouri Pac. Rwy. Co., 85 Mo. 164	33
Renlund v. Commodore Min. Co., 89 Minn. 41	33
Romano v. Capital City Brick Co., 125 Iowa, 591	33
Roberts v. Great Northern Rwy. Co., 161 Fed. 239	9
Ross, In re, 140 U. S. 453	15
Ruegg's Employers' Liability and Workmen's Compensation	25
Rush, Hon. Richard	40
Schofield, Prof. Henry	44
Schouler, James, on Personal Property	21
Seaman v. Clarke, 69 N. Y. Supp. 1002	21
Sinking Fund Cases, 99 U. S. 700	20
Slater v. Mexican Natl. R. R. Co., 194 U. S. 120	40
Slocum v. New York Life Ins. Co., 228 U. S. 364	43, 44, 45
Smith v. New York Consol. Stage Co., 28 How. Prac. (N. Y.) 277,	21
Stanbery, Hon. Henry	41
Stewart v. Balt. & Ohio R. R. Co., 168 U. S. 445	41
Story's Conflict of Laws	24
Szymanski v. Blumenthal, 3 Pennewill (Del.) 558	33
Taylor, Adm., v. Taylor, 232 U. S. 363	42
Taylor, et al., v. Carpenter, 3 Story, 458	40
The Amistad, 15 Pet. 518	15
Thornley v. United States, 113 U. S. 310	30
Thornton on Federal Employers' Liability and Safety Appliance Acts	34
Treaty Between United States and France	16
Treaty Between United States and Great Britain	18
Treaty Between United States and Italy	10, 14
Treaty-making Power of United States, by Butler	23
Trotta's Adm. v. Johnson, 121 Ky. 827	33
Tucker v. Alexandroff, 183 U. S. 424	15, 19
United States v. Graham, 110 U. S. 219	30
United States v. O'Keefe, 11 Wall. 178	27

ALPHABETICAL LIST OF CASES—(Continued).

	Page
United States v. Schooner "Peggy," 1 Cranch, 103	16
United States v. Temple, 105 U. S. 97	30
United States v. Texas, 162 U. S. 1	15
Varesick v. The British Columbia Copper Co., Ltd., 12 B. C. 286	27, 39
Vetaloro v. Perkins, 101 Fed. 393	33
Wharton on the Conflict of Laws	38, 40
Williamson v. United States, 207 U. S. 425	8
Williams, Joshua, on Law of Personal Property	21
Workmen's Compensation Act, by Adshead Elliott	25
Workmen's Compensation, by Boyd	32, 34
Workmen's Compensation Act of Michigan	31
Workmen's Compensation Act of New Hampshire	31
Workmen's Compensation Act of New Jersey	31
Workmen's Compensation Act of New York	31
Workmen's Compensation Act of Washington	31
Workmen's Compensation Act of Wisconsin	31
Zeiger v. Penna. R. R. Co., 151 Fed. 348	9
Zeiger v. Penna. R. R. Co., 158 Fed. 809	9

IN THE

Supreme Court of the United States.

October Term, 1913. **No. 993.**

BRIDGET McGOVERN, ADMINISTRATRIX OF THE ESTATE OF PETER McGOVERN, DECEASED,
Plaintiff in Error and Plaintiff Below,

v.

PHILADELPHIA AND READING RAILWAY COMPANY,
Defendant in Error and Defendant Below.

WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

An action in trespass brought in the District Court of the United States for the Eastern District of Pennsylvania under the Railroad Employers' Liability Act of Congress of April 22, 1908, as amended April 5, 1910, by the administratrix, a resident of Pennsylvania, and appointed administratrix by the Pennsylvania courts, to recover damages on behalf of the parents of the deceased, resident in Ireland, for the alleged negligent killing of their son, a single man, while resident in this country and in the employ of defendant in error railroad company.

STATEMENT OF THE CASE.

The plaintiff in error, Bridget McGovern, is a resident of Philadelphia, Pennsylvania. On April 10, 1913, she was appointed administratrix of her dead brother's estate by the Register of Wills of Philadelphia County. In June, 1913, as such administratrix, she began this present suit in the District Court of the United States for the Eastern District of Pennsylvania. The suit is instituted under and in accordance with the provisions of the Act of Congress of April 22, 1908, and its amendment of April 5, 1910, and is against the Philadelphia and Reading Railway Company, a corporation incorporated under the laws of the State of Pennsylvania. The dead man was single, twenty-four years of age, had been in this country about one year and eight months, and was the partial support of his parents, Patrick McGovern and Bridget McGovern, who were in indigent circumstances, living in the vicinity of Swanlinbar, County Caven, Ireland, United Kingdom of Great Britain. The evidence showed that the deceased sent each month ten dollars of his earnings to his parents in Ireland towards their support.

From the time of the arrival of deceased in this country in May, 1911, with the exception of about three months, when he worked for a Philadelphia gas company, he was employed by the Philadelphia and Reading Railway Company. His position was that of a laborer or section hand on and about the roadbed, track and right of way.

On the twenty-fourth of December, 1912, he was sent with his gang of fellow-workers to help clean the snow from the tracks at a place on the Reading Railroad, called Sixteenth Street Junction, being part of the main line approach to the Reading Terminal Sta-

tion in Philadelphia, and the Junction itself being within the city limits. It was a bleak, squally day, with occasional violent flurries of snow, and with a rare or light atmospheric pressure, fog, mist and smoke lying thick and low. At the spot where the men were working were four main lines of trackage. Shortly after nine o'clock A. M. the gang was warned off what was termed track number four, in order to let a local train from Norristown, Pennsylvania, pass by. While they were waiting on the adjoining track, suddenly and without any warning whatsoever, coming unexpectedly out of the fog, an express train bound from New York City to Philadelphia, dashed into and through the group, striking several and killing two of their number. McGovern was one of the two men killed. The testimony showed conclusively that these section men had no notice in any manner of the approach of this train, that it was not, and could not be, seen until it was directly upon them, and that there should have been a watchman or look-out whose duty it was to ascertain when trains were approaching and warn the men, but that this watchman had departed on an errand of some sort.

At the trial of the case in November, 1913, a jury awarded the plaintiff in error a verdict for seven hundred dollars and apportioned it equally between father and mother.

Defendant in error filed motions for a new trial and for judgment *non obstante veredicto*. After argument the learned court below filed on January 7, 1914, an opinion (p. 80 of Record), *stating that defendant in error's request for binding instructions at the time of trial should have been granted, and directing a new trial.*

At the second trial in February, 1914, where identically the same testimony was produced by both sides, the learned court below affirmed the point of defend-

ant in error and directed the jury to render a verdict in favor of defendant in error on the ground that any recovery in the suit would be for the benefit of non-resident aliens, and as they had no right to recover under the provisions of the Act of April 22, 1908, the Federal court could not take jurisdiction of the case.

Thereupon a writ of error was taken from the District Court of the United States for the Eastern District of Pennsylvania to this Court, conformably with the conditions of the fifth section of the Act of Congress of March 3, 1891.

ASSIGNMENTS OF ERROR.

1. The District Court of the United States for the Eastern District of Pennsylvania erred in affirming defendant's third point at the trial of the above case, as follows:

> "The evidence in this case, which is uncontradicted, shows that the parents of the decedent, to wit, Patrick McGovern and Bridget McGovern, for whose benefit this action is brought under the Act of Congress of April 22, 1908, as amended April 5, 1910, are non-resident aliens, being citizens of and residents in Great Britain, and therefore they have no right under the said Act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant."

2. The District Court of the United States for the Eastern District of Pennsylvania erred in affirming defendant's fourth point at the trial of the above case, as follows:

> "Under all the evidence in this case, the verdict should be for the defendant."

3. The District Court of the United States for the Eastern District of Pennsylvania erred in directing the jury to render a verdict in favor of the defendant at the trial of the above case.

4. The District Court of the United States for the Eastern District of Pennsylvania erred in holding at the trial of the above case that non-resident aliens and residents and citizens of a country other than the United States of America could not recover under the provisions of the Railroad Employers' Liability Acts of Congress, approved April 22, 1908, and April 5,

1910, and that such residents and citizens of countries other than the United States of America are not entitled to the benefits and remedies of said Acts.

5. The District Court of the United States for the Eastern District of Pennsylvania erred in holding that a citizen and resident of the United Kingdom of Great Britain and Ireland is not entitled to recover under the provisions and remedies of the Railroad Employers' Liability Act of Congress, approved April 22, 1908, as amended April 5, 1910, the same as a citizen and resident of the United States of America, by reason of the terms and provisions of the existing treaties in force between the United States of America and the United Kingdom of Great Britain and Ireland, and also by reason of these treaties taken in connection with the treaties in force and effect between the United States of America and other countries.

6. The District Court of the United States for the Eastern District of Pennsylvania erred in not changing its order directing a new trial in the above case to an order entering judgment in favor of the defendant *non obstante veredicto*, after the first trial, when said order was based upon the finding of the jury of a fact from undisputed and essential evidence presented by plaintiff herself at the trial, which evidence was the foundation of plaintiff's whole case, and plaintiff was willing to stipulate that this evidence would necessarily be the same at any new or subsequent trial, and plaintiff was willing to waive any rights she might have had to a new trial because of the language in said order of said District Court ordering a new trial.

7. The District Court of the United States for the Eastern District of Pennsylvania erred in refusing to take jurisdiction of the case because the parties benefited by any recovery are non-resident aliens.

ARGUMENT.

This appeal is upon a writ of error directly from the District Court of the United States for the Eastern District of Pennsylvania to this court upon a question of jurisdiction; in accordance with paragraph 2, section 5, of the Act of Congress of March 3, 1891 (26 Stat. at Large, 826, chap. 517, U. S. Comp. Stat., 1901, page 488). A certificate of the trial judge accompanies the writ, showing how the question of jurisdiction arose. In addition to this, however, as carrying out the better practice outlined by this Court in the case of

Nichols Lumber Co. v. Franson, 203 U. S. 278 (1906),

a bill of exceptions, including the entire testimony given at the trial, and a complete record of all the pleadings, opinion filed, etc., also accompanies the writ.

This record shows that, aside from the jurisdictional question as certified to by the judge below, there was also involved in the case the construction and application of treaties of the United States with foreign countries, and that therefore there was the right of direct appeal to this Court under paragraph 6, section 5 of the aforesaid Act of 1891.

Under the decision of this Court in

Giles v. Harris, 189 U. S. 475 (1902),

the jurisdiction of the Court cannot, therefore, be narrowed to a review of the single question raised by the certificate of the district judge, but all questions involved and raised in the appeal will be comprehensively considered and decided.

Vide:

Williamson v. United States, 207 U. S. 425 (1908).

The one big, broad question in the appeal is:

CAN NON-RESIDENT ALIENS BENEFIT UNDER THE PROVISIONS OF THE ACT OF CONGRESS OF APRIL 22, 1908?

Although defeated in the court below, plaintiff in error maintains the affirmative of this proposition and approaches and presents the question from several different avenues, viewpoints or angles, from any one of which, it is submitted, plaintiff in error is correct in her contention.

Plaintiff in error holds that a non-resident alien has the right to benefit under the remedies and provisions of the Act of 1908 by reason of

1. THE DECISION OF THIS COURT IN MAIORANO V. BALTIMORE AND OHIO RAILROAD COMPANY.
2. THE TREATIES BETWEEN THIS COUNTRY AND GREAT BRITAIN AND IRELAND, AS WELL AS OTHER COUNTRIES.
3. INTERNATIONAL COMITY AND RECIPROCITY.
4. THE PLAIN READING OF THE ACT ITSELF.
5. THE GENERAL POLICY OF THIS COUNTRY.

We will take these heads up in order.

UNDER THE DECISION OF THIS COURT IN MAIORANO V. BALTIMORE AND OHIO RAILROAD COMPANY PLAINTIFF IN ERROR CAN RECOVER IN THIS SUIT.

The first and only time, apparently, when this question has been directly before this Court was when this court, in

Maiorano v. Baltimore and Ohio Railroad Co., 213 U. S. 268 (1908).

affirmed the finding of the Supreme Court of Pennsylvania in 216 Pa. 402. That decision turned upon whether or not the highest State court had the right to interpret the Acts of the particular State Legislature in the manner it deemed best. This Court held it had.

Vide:

Maiorano v. B. & O. R. R. Co., 216 Pa. 402 (1907);

Deni v. Penna. R. R. Co., 181 Pa. 525 (1897).

And the affirming decisions of the Federal courts following the decisions of the respective State courts:

Baltimore and Ohio Railroad Co. v. Baldwin, 144 Fed. 53 (1906);

Brannigan, v. Union Gold Mining Co., 93 Fed. 164 (1899);

Zeiger v. Penna. R. R. Co., 151 Fed. 348 (1907);

Zeiger v. Penna. R. R. Co., 158 Fed. 809 (1908);

Roberts v. Great Northern Ry. Co., 161 Fed. 239 (1904);

Fuleo v. Schuylkill Stone Co., 163 Fed. 124 (1907).

In conjunction with the above point in the Maiorano decision by this Court also arose the question whether, in so constructing the State law, the Federal treaty was violated with the particular country the rights of whose subject or citizen were implicated; and this country in this case happened to be Italy. This Court held that the terms of such treaty were not thereby abused.

At that time the only provision of a treaty applicable and in force between the United States and Italy was as follows, being article 3 of the treaty, ratifications of which were exchanged on November 18, 1871:

> "The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for person and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Under this treaty it was contended that the widow, residing in Italy, of a dead man, killed in Pennsylvania, could bring suit in her own name in the Pennsylvania courts (as is the law in Pennsylvania) to recover damages for the negligent killing of her husband. The Pennsylvania court found she could not, and this Court upheld the highest court of appeal in Pennsylvania in that finding.

Since that time a new treaty has been entered into between this country and Italy, signed at Washington on February 25, 1913, and proclaimed July 3, 1913. A provision in this new treaty (in fact the only provision in the treaty) is supposed to cover this special point and permit the recovery in the State and Federal courts of the United States by citizens and subjects of Italy, resident therein, for any similar cause of action, exactly the same as citizens and natives of the United States.

The article of this treaty upon this subject is as follows:

> "The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted

by any State or National law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

Since the time of rendering this decision also the Legislature of Pennsylvania has passed an Act remedying this condition and permitting non-resident aliens to recover in Pennsylvania in like cases.

This Act is as follows:

"Act of Pennsylvania Legislature, approved June 7, 1911, P. L. 678.

"Section 1. Be it enacted, etc., that section 1 of an Act entitled 'An Act relating to damages for injuries producing death,' approved the twenty-sixth day of April, Anno Domini, one thousand eight hundred and fifty-five, which reads as follows:

" 'Section 1. Be it enacted, etc., that the persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased; and no other relatives, and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors,' be amended so as to read as follows:

"Section 1. Be it enacted, etc., That the persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children, or parents of the deceased shall be entitled to recover, whether he, she, or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens

> or residents of any other State or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth."

But plaintiff in error holds, apart from the consideration of treaty rights, that the decision of

Maiorano v. Balt. & Ohio R. R. Co., supra,

supports her argument in the present case.

In concluding this decision this phraseology is used by this Court, and we must remember that in the Maiorano case the attempt was made by the non-resident alien to bring suit in her own name in a court in this Country, and that in the case now before us suit is brought by the personal representative resident in this Country:

> "If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, INCLUDING ALL RIGHTS OF ACTIONS FOR HIMSELF OR HIS PERSONAL REPRESENTATIVES TO SAFEGUARD THE PROTECTION AND SECURITY, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may, indirectly promote his safety."

This is precisely the right contended for by plaintiff in error in this action,—the right of a personal representative to bring and maintain the action. The fact that incidentally it happens that the next of kin reside abroad at the time of the occurrence has nothing

really to do with the action. The personal representative, or administratrix, is here and within the jurisdiction of our courts; she is the active plaintiff; and that is sufficient for the bringing and the maintenance of the action.

While it is true that the above expression was used in interpreting the former Italian treaty, yet the right contended for and demanded under the treaty was refused, and it would appear that by this decision this court meant that the terms of the treaty were fully complied with "if an Italian subject, sojourning in this country" was given the protection and security ordinarily extended to all foreigners in a like situation, of "all rights of actions for himself or his personal representatives," the same as are enjoyed by natives and citizens of the United States.

UNDER THE TERMS OF THE TREATIES BETWEEN THE UNITED STATES AND FOREIGN COUNTRIES, ESPECIALLY WITH ITALY AND WITH GREAT BRITAIN AND IRELAND, PLAINTIFF IN ERROR CAN RECOVER IN THIS SUIT.

Even if plaintiff in error wrongly understands the meaning of the decision of this Court, as stated above, in the latter part of the Maiorano case, and this Court did not intend to state that generally non-resident alien relatives were safeguarded and secured by their right to sue through personal representatives in the courts of this country for the negligent killing of a person upon whom they were dependent, and that this right existed independent of any treaty provisions, then the only other alternative meaning of this decision is that, by reason of the Italian treaty then in force, this right of action through personal representatives for a negligent death was given to non-resident alien relatives.

If this is true, then plaintiff in error has a good cause of action and should be allowed to recover because she is acting in the legal capacity of a personal representative and by the most favored nation clause of treaties the same rights extended to subjects and citizens of Italy are bound to be given likewise to subjects and citizens of Great Britain and Ireland.

Although not expressly set forth in treaties, by comity and practice the most favored nation clause is now enlarged to all friendly and important nations.

If the Maiorano decision had never been rendered and no such construction placed upon the former treaty between the United States and Italy, then surely today the more clearly expressed and distinctly outlined provision upon this subject of the second treaty entered into between the United States and Italy (as set forth in the early part of this argument) would be held to apply.

Because of the most favored nation clause the terms of this treaty would be held to apply to subjects of Great Britain and Ireland. This second treaty was signed February 25, 1913, ratified respectively March 1, 1913, and June 21, 1913; ratifications exchanged July 3, 1913, and proclaimed July 3, 1913. It provided it should go into operation upon the exchange of the ratifications.

The accident and death of deceased occurred on December 24, 1912; letters of administration were taken out on April 10, 1913; suit was brought on June 16, 1913, and the two trials were held in October, 1913, and February, 1914.

Because of these facts,—the death happening before the signing and proclamation of the treaty—the trial judge held the treaty could have no application to this especial case. Was he correct in so holding?

The question naturally arises: Did this treaty make a new law, or did it merely reiterate and emphasize what had been the law, the more especially when one came to consider the wording of the decision of the Maiorano case with regard to non-resident aliens having the right to act in this country through the personal representatives of a dead relative as applied to the provision of the Federal Railroad Employers' Liability Act of April 22, 1908, requiring all actions for death to be brought by and in the name of the personal representatives? If the old law, as applied to the facts of this case was merely rehearsed then plaintiff in error's right of action was not affected.

If a new rule of law was promulgated by this treaty, however, did it go back and cover all cases, which, though originating before, nevertheless had not been tried and decided up to that time? Plaintiff in error holds that it did. This treaty undoubtedly meant to apply to all appropriate cases not yet determined.

This Court has held on several occasions that treaties are construed with regard to the intention as well as with reference to justice and convenience.

The Amistad, 15 Pet. 518, 591, 595 (1841);
United States v. Texas, 162 U. S. 1 (1895);
Tucker v. Alexandroff, 183 U. S. 424 (1901).

Likewise a treaty is to be construed in the light of all the facts and circumstances surrounding its making.

In re Ross, 140 U. S. 453 (1891).

If the treaty of 1913 between the United States and Italy was meant to correct an injustice which had theretofore been undesignedly committed against Italian subjects, and the provisions of this treaty by the most favored nation clause were extended to subjects of Great Britain and Ireland, then certainly, the treaty

then being in force, that injustice and wrong could not be perpetuated at a trial taking place several months after the proclamation of this treaty, simply, forsooth, because the death of the party happened a short time prior to the treaty being negotiated.

There is a precedent for this contention.
In the case of

> United States v. Schooner "Peggy," 1 Cranch, 103 (1801),

a somewhat similar situation existed. On April 24, 1800, during the period of a little unpleasantness with France, the French schooner "Peggy" was captured a few miles to the westward of Port au Prince, by the American ship "Trumbull." The "Peggy," with all "her apparel, guns and appurtenances, and goods and effects" was duly condemned as forfeited to the United States as a legitimate prize of war on September 23, 1800.

Afterwards, on the thirtieth of September, 1800, a convention was signed by the respective plenipotentiaries of the two nations at Paris. On the eighteenth of February, 1801, it was ratified by the President of the United States. On the thirty-first of July, 1801, ratifications were exchanged at Paris; and on the twenty-first of December, 1801, the treaty was promulgated by the President.

This treaty provided in its fourth article, that:

> "property captured and not yet *definitely* condemned, or which may be captured before the exchange of ratifications shall be eventually restored.
>
> "This article shall take effect from the date of the signature of the present convention."

The question was whether the "Peggy" could be considered as *definitely* condemned within the meaning of the article. The lower court held it could; but

this Court reversed. Chief Justice John Marshall delivered the opinion. After stating that a treaty must be considered the supreme law of the land, as this Court has frequently since held, he said:

> "It is in general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

There certainly appears to be an analogy between the conditions and circumstances when the "Peggy" case was decided and the present case.

In the present case it is submitted that it is not a matter which concerns mere private parties, but which affects all the citizens of two great nations, in fact, three nations. Surely it is as important and desirable to preserve the amity, the good faith and the fellowship of nations and their peoples, as it is to return the

spoils of war. There is no necessity or request to set aside a judgment or give up vested rights, as in the "Peggy" case, but the court is only asked to recognize and enforce the law of the land at the time of the trial, which law came into existence between the time of the death and the time of trial. There is no doubt about the law's constitutionality. Should it not have been treated as the law applicable to the case when the trial took place? Would not so doing have carried out the full intentions of the parties and the real purpose of the law?

Ignoring, however, if so required, the treaties between the United States and Italy and the doctrine of the most favored nation clause, plaintiff in error maintains that she has the right to bring the present suit and to recover therein by reason of direct treaty rights and provisions between the United States and Great Britain and Ireland.

The following articles occur in the Treaty of March 2, 1899, between United Kingdom of Great Britain and Ireland and the United States of America:

"ARTICLE II.

"The citizens or subjects of each of the contracting parties shall have full power to dispose of their personal property within the territories of the other by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

"ARTICLE V.

"In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the High Contracting Parties shall in the Dominions of the other enjoy the rights which have or may be accorded to the citizens or subjects of the most favored nation."

Now let us recall the rules of construction of treaties as laid down by this Court:

"A treaty is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights."

Maiorano v. Balt. & Ohio R. R. Co., supra.

A treaty constitutes a part of the supreme law of the land, and should receive a fair and liberal interpretation according to the manifest intention of the contracting parties.

Chew Heong v. U. S., 112 U. S. 536 (1884);
Tucker v. Alexandroff, 183 U. S. 424 (1901).

Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure *equality* and *reciprocity* between them.

De Geofrey v. Riggs, 133 U. S. 258 (1889).

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.

Hauenstein v. Lynham, 100 U. S. 483 (1879).

Again, the words of a treaty should be interpreted by the general sense and spirit of the treaty as shown by the context and the provisions of the instrument as

a whole; and by taking the reasonable instead of the literal sense of the word when the two senses do not agree.

Herod on Favored Nation Treatment, page 9;
Hall's Int. Law, pages 350-355 (4th Ed.).

Let us remember also that this Court has evidently adopted the doctrine as expounded by the Pennsylvania courts (where this death occurred) that a suit for the death, not begun in the deceased's lifetime, is not a

> "right of action given to the person suffering the injury, since no man could sue for his own death, but to his widow or personal representative. It is not the survivorship of the cause of action, . . . but the creation of an original cause of action in favor of a surviving widow or personal representative."

Chambers v. Baltimore & Ohio R. R. Co., 207 U. S. 142, 150 (1907);
Maiorano v. Baltimore & Ohio R. R. Co., supra.

Then the question arises,

WITHIN THE BROAD INTENT OF THIS TREATY IS SUCH A RIGHT OF ACTION FOR THE DEATH THE PERSONAL PROPERTY OF THE HEIRS?

Plaintiff in error strongly contends that it must be so held.

In the

Sinking Fund Cases, 99 U. S. 700, 738, (1878),

this Court asks itself the question, "What is property? What is the common understanding of the term? It is, in reference to its subject, whatever a person can possess and enjoy by right, and the person who

has that right has the property. The subject may be corporeal or incorporeal. A right of action is as completely property as is a title to land."

Such has been said to be the law by numerous highest State courts also.

Seaman v. Clarke, 69 N. Y. Supp. 1002, 1004 (1901);
Power v. Harlow, 57 Mich. 107, 111 (1885);
Battishell v. Humphreys, 64 Mich. 494 (1887);
Smith v. New York Consol. Stage Co., 28 How. Prac. (N. Y.) 277, 279, 280 (1865).

The text-books agree likewise with this view.

"The right of action ex delicto is a thing valuable in money and therefore property."

Law of Personal Property, by Joshua Williams (16th Ed.), pages 144, 148;

Vide, also,

Personal Property, by James Schouler, (3d Ed.), Sects. 11-15, 58;
Personal Property, 32 Cyc., page 669.

It would, therefore, seem to be apparent that under the clear meaning of the language of the treaty of 1899 between the United States and the United Kingdom of Great Britain and Ireland, this plaintiff in error has the absolute right to bring her present suit and to recover therein.

Exception might, possibly be taken to the real reference of the pronoun "their," being the third "their" in Article II of said treaty. Does it refer to "citizens or subjects" in the first sentence of this article, or does it refer to "heirs, legatees and donees" in the second sentence? It is submitted that it makes

no practical difference in the present case which one of these two classes of persons it relates to. In either case, the result is the same and the rights of the present plaintiff are conserved. If it refers to "citizens or subjects" in the first sentence, then the heirs abroad instantly come within this category upon the death of the deceased in this country; if it refers to "heirs, legatees and donees" in the second sentence, then the heirs abroad of the deceased are of course included within the scope of these words. And this, too, is plain, no matter which of the two theories of the origin of the suit for death by negligence is accepted—whether the old idea, advocated by certain authorities, that it is a survival of deceased's own action, or whether the newer thought, and apparently the one approved by this Court, vide,

> Mich. Central R. R. Co. v. Vreeland, 227 U. S. 59, 67 (1912),

that it is an entirely new cause of action unknown to the common law, and created solely by special statute. In either case it is personal property belonging to the heirs of the dead man negligently killed.

Aside from these claimed treaty rights, although the law in this Country is that the rights of foreigners to real estate and immovable property rests primarily in the laws of the State where such property is situated.

> Hauenstein v. Lynham, 100 U. S. 483 (1879);
> Blythe v. Hinckley, 180 U. S. 333 (1900).

yet this court has held that this law does not apply to personal estate, but that aliens have full power and right in this Country to succeed thereto.

> McLearn v. McLellan, 10 Pet. 625, 637 (1836).

If this Court believes, however, that none of these treaties cited apply to and control the present case, then it is submitted that

BY INTERNATIONAL LAW AND THE LAW OF COMITY AND RECIPROCITY BETWEEN NATIONS THIS PLAINTIFF SHOULD BE ALLOWED TO RECOVER.

It is submitted that by the law of comity of nations, as laid down and recognized by this Court, the plaintiff in error has a good cause of action in proceeding under this statute. International law is undoubtedly part of the law of this land.

Butler's The Treaty-making Power of the United States, Vol. 2, pages 187 and 223;

Love v. United States, 29 Ct. of Claims, 332 (1894);

Ekin, Nishimura v. United States, 142 U. S. 651 (1891).

Mr. Justice Cooley says:

"The obligations of international comity, we trust, will never be questioned in this State, especially when they are invoked in behalf of our neighbors of the Dominion, with whom our relations are so intimate, and it may be added, so friendly and cordial. WE SHOULD CERTAINLY NEVER HAVE THE ASSURANCE TO DEMAND FROM THEM MORE THAN WE WOULD FREELY AND VOLUNTARILY CONCEDE TO THEM. TRUE COMITY IS EQUALITY; WE SHOULD DEMAND NOTHING MORE AND CONCEDE NOTHING LESS."

McEwan v. Zimmer, 38 Mich. 765, 769 (1878).

In the leading case of

Hilton v. Guyot, 159 U. S. 113 (1894),

Mr. Justice Gray, of this Court, quotes with approval from the decision of Odwin v. Forbes (1817), in the Court of Demerara, which was governed by Dutch law:

> "It is a principle of their law, and laid down particularly in the ordinances of Amsterdam, that the same law shall be exercised towards foreigners in Amsterdam as is exercised with respect to citizens of that State in other countries; and upon this principle of reciprocity, which is not confined to the city of Amsterdam, but pervades the Dutch laws, they have always given effect to the laws of that country which has exercised the same comity and indulgence in admitting theirs."

In commenting upon this, Mr. Justice Story says:

> "This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence."

Story's Conflict of Laws, Sect. 618.

Says Mr. Justice Gray, of this Court, in the case of

Paquette Habana, 175 U. S. 677 (1900):

> "For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."

Says Chief Justice Taney in

Bank v. Earle, 13 Pet. 519, 589 (1839):

> "Comity contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations."

This being so, let us proceed to see how the English courts have treated non-resident aliens in any

effort they may have made to recover therein under English liability laws.

In Great Britain, in case of death resulting from injury, by virtue of the words at the end of the first section of the Employers' Liability Act of England, enacted in 1880, Lord Campbell's Act of 1846, or the "Fatal Accidents Act," as it is commonly termed, is incorporated into it. Both these Acts must, therefore, in England and Ireland, be considered together, for the liability arises from both, and the special procedure required by both must be observed.

> Ruegg's Employers' Liability and Workmen's Compensation, Seventh Edition, page 148.

It has been held by the English courts, although the Acts themselves are silent on this point, the same as our Acts, that they apply as well for the benefit of the representatives of a deceased foreigner killed on the high seas, as for those of a British subject.

> Davidson v. Hill, 2 K. B. 606 (1901).

It has also been held, under these Acts, that a workman injured abroad could sue his employer in England, provided the law of the foreign country did not prohibit such an action.

The English Workmen's Compensation Act of 1906 has also been declared to apply to non-resident aliens and to include within its definition of "dependents" upon a deceased workingman, killed in the course of his employment and by causes arising out of his employment, the non-resident alien relatives of such workingman.

> The Workmen's Compensation Act, by Adshead Elliott, Sixth Edition, page 311.

In

Baird and Co., Ltd., v. Savage or Birsztan, 43 Scottish Law Reporter, 300 (1906),

the English courts upheld the claim of the widow of a workman, killed at his employment in Scotland where he had resided for but nine months, and whose widow resided in Poland at the time of the occurrence and death, had never before been in England, and only came there to present a claim for compensation for her husband's death.

The case of

Mike Krzus v. Crow's Nest Pass Coal Co., Ltd., Law Reports, Appeal Cases, 590 (1912);

Also Butterworth's Workmen's Compensation Cases, Vol. 6, page 271 (New Series);

is an action brought under the British Columbia Workmen's Compensation Act of 1902, equally silent on the residence of beneficiaries. In that case the House of Lords decided, reversing the British Columbia court, in a carefully considered opinion, in a suit brought by the personal representative of a deceased workman, killed by an accident while engaged in his labors, which suit was brought on behalf of the workman's widow, who resided in Austria at the time of the occurrence and death, as well as at the time of the suit, and was not a British subject, that the widow, as a non-resident alien, should be allowed to recover. THIS DECISION IS PUT SQUARELY UPON THE PROPOSITION (PAGE 597) THAT IF THE STATUTE MEANT OTHERWISE, IT SHOULD HAVE SAID SO IN PLAIN WORDS, AND THEREFORE THE COURT WAS BOUND TO ALLOW A RECOVERY.

To the same effect are the cases of

Davidsson v. Hill, 70 L. J., K. B. 788 (1901);

where a widow and children, resident in Norway, were allowed to recover under Lord Campbell's Act, and

Varesick and Another v. The British Columbia Copper Co., Ltd., 12 B. C. 286 (1906);

where it was held that deceased's parents, aliens resident in Austria, should be allowed to recover under the Workmen's Compensation Act of British Columbia of 1902.

Although there is no record of any case having arisen in England and Ireland or British possessions of a claim by personal representatives on behalf of an American citizen or dependent under any of these statutes, yet there is no question whatever, under the above decisions, that such a claim, when it arises, will be properly recognized, and that the general law of England and Ireland is that a non-resident alien has the legal right to enjoy the benefits of the statutes.

And as the English Compensation Acts apply to seamen, many of whom are foreigners, the damages which will eventually be recovered from English firms and companies under these broad decisions will be of no inconsiderable consequence.

By the laws of international reciprocity and comity, therefore, we are bound to extend the same rights and benefits, under our own laws, to British subjects.

In saying this as to this particular subject, we are not attempting to emphasize any new or strange doctrine, for this Court has already said this in so many words.

In

United States v. O'Keefe, 11 Wall. 178, 183 (1870);

which was an appeal from the allowance of a British subject to prosecute a claim in the Court of Claims, and it was shown that by the practice and the decisions of the English courts an American citizen could do likewise in Great Britain, this Court, through Mr. Justice Davis, said:

> "In this condition of the law regarding the petition of right, which is conceded to aliens as well as to subjects, how can it be contended that the British government does not accord to citizens of the United States the right to prosecute claims against it in its courts? It is of no consequence that, theoretically speaking, the permission of the Crown is necessary to the filing of the petition, because it is the duty of the King to grant it, and the right of the subject to demand it. And we find that it is never refused, except in very extraordinary cases, and this proves nothing against the existence of the right. . . . It would be a severe rule of interpretation that would exclude all British subjects from the Court of Claims, because in a few sporadic cases, from motives of State policy, the petition of right was denied, AND WE CANNOT IMPUTE TO THE LEGISLATURE AN INTENTION THAT WOULD PRODUCE SUCH A RESULT, IN THE ABSENCE OF AN EXPRESS DECLARATION TO THAT EFFECT."

This, it is submitted, is precisely the reasoning which fits the case now before us.

But, again, it is contended that,

UNDER THE PLAIN READING OF THE STATUTE ITSELF THIS PLAINTIFF IN ERROR SHOULD BE ALLOWED TO RECOVER.

If the statute had meant that a non-resident alien would not be permitted to recover or benefit under its terms, it should have said so in plain and unvarnished words. It is silent on the subject. Therefore, the presumption is that anyone, no matter where residing,

or a citizen of what country, if eligible otherwise and coming within the terms of the statute, has a good cause of action, which the courts of this Nation are bound to recognize and enforce.

The statute says in simple language: "In case of death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee," etc.

The meaning of these words surely seems sufficiently clear.

> "When, indeed, the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise, and 'those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded.' It is not allowable, says Vattel, to interpret that which has no need of interpretation. *Absoluta sententia expositore non eget.* Such language best declares, without more, the intention of the law given, and is decisive of it. The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It is, therefore, only in the construction of statutes whose terms give rise to some ambiguity, or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the law makers. Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent."
>
> The Interpretation of Statutes, by Endlich, Section 4.

Where the language of an act is so clear and explicit as not to be open to construction, its construction

cannot be changed by the practice of the departments, however long continued.

United States v. Graham, 110 U. S. 219 (1883);
Thornley v. United States, 113 U. S. 310 (1884).

A statute must be held to mean what the language imports. When it is clear and imperative, reasoning *ab inconvenienti* is of no avail, and there is no room for construction.

Boudinot (Cherokee Tobacco) v. United States, 11 Wall. 616 (1876).

A statute should be read according to the natural and obvious import of its language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation; and when the language is plain, words or phrases should not be inserted so as to incorporate in the statute a new and distinct provision.

United States v. Temple, 105 U. S. 97 (1881);
Lake County v. Rollins, 130 U. S. 662 (1888);
Batt Refrigerating Co. v. Sulzberger, 157 U. S. 1 (1894).

So universally has this come to be regarded as the true rule of interpretation, that where the legislatures of the individual States have passed compensation acts and have decided that the benefits of those acts shall not be participated in by non-resident aliens, they have incorporated distinct and unequivocal provisions in those acts to that effect.

Vide, notably,

Workmen's Compensation Act of New Jersey, Laws of 1911, Chap. 95, end of Sect. 12;

Workmen's Compensation Act of State of Washington, Laws of 1911, Chap. 74, end of Sect. 3;

Workmen's Compensation Act of New Hampshire, Laws of 1911, Chap. 163, Sect. 6.

In two of these Workmen's Compensation Acts, viz., those of

Workmen's Compensation Act of Wisconsin, Laws of 1911, Chap. 50, Sect. 10, par. 5;

Workmen's Compensation Act of Michigan, Laws of 1912, No. 3, Sect. 7,

specific provisions are incorporated providing that non-resident aliens shall be allowed to recover as defendants under the acts.

In the most recent Workmen's Compensation Act passed, that of the State of New York, being Chapter 816 of the Laws of 1913, Section 17 thereof makes its provisions applicable to non-resident aliens.

The remainder appear to be silent on the subject. Vide,

Bradbury's Workmen's Compensation and Insurance Law of the United States.

The Workmen's Compensation Act of California, Laws of 1911, Chap. 399, has been construed by the board to include in its benefits non-resident aliens.

Vide,

Boyd on Workmen's Compensation, Sect. 263.

Where the statute, allowing recovery, is silent as to whether or not non-resident aliens can recover thereunder, Pennsylvania and Wisconsin seem to have been the only States deciding that this silence by implication means they should not. Even in these instances, in Pennsylvania, which still has no Compensation or Liability Act, since her highest court decided the Maiorano case (supra), this matter has been cured by a subsequent statute (supra), providing specifically that non-resident alien relatives can recover for a death caused by negligence, and Wisconsin since the decision of

McMillan v. Spider Lake Saw Mill & Lumber Co., 115 Wis. 332 (1902),

preventing non-resident aliens from recovering, has passed a general Workmen's Compensation Act, providing that non-resident aliens should be included in the beneficiaries thereof.

In all other States, where this question has arisen, and where the statutes are silent on the point of the relatives who shall recover for a negligent death, it appears to have been held in respective State courts that, by the plain reading of the statute itself, non-resident aliens are necessarily included among those entitled to the remedies and benefits of the statute.

Vide:

Kellyville Coal Co. v. Petraytis, 195 Ill. 215 (1902);

Ann Mulhall v. John Fallon, etc., 176 Mass. 266 (1900);

Vetaloro v. Perkins, 101 Fed. 393 (1900) (Massachusetts);

Szymanski v. Blumenthal, 3 Pennewill (Del.) 558 (1902);

Renlund v. Commodore Min. Co., 89 Minn. 41 (1903);

Bouthron v. Phoenix Light & Fuel Co., 8 Ariz. 129 (1903);

Romano v. Capital City Brick Co., 125 Iowa, 591 (1904);

Cleveland C. C. & St. L. R. R. Co. v. Osgood, 36 Ind. App. 34 (1905);

Pocohontas Collieries Co. v. Rukas Admr., 104 Va. 278 (1905);

Alfson v. Bush Co., 182 N. Y. 393 (1905);

Pittsburgh, C. C. & St. L. R. Co. v. Naylor, Admr., 73 Ohio St. 115 (1905);

Jeffersonville, etc., Co. v. Hendricks, 41 Ind. 48, 71 (1872);

Luke v. Calhoun County, 52 Ala. 115 (1875);

Philpott v. Missouri Pac. Rwy. Co., 85 Mo. 164 (1884);

Chesapeake, etc., Co. v. Higgins, 85 Tenn. 620 (1887);

Augusta Rwy. Co. v. Glover, 92 Ga. 132, 142 (1893);

Trotta's Adm. v. Johnson, 121 Ky. 827 (1906);

Atchison, T. & S. F. R. Co. v. Fajardo, 74 Kan. 314 (1906);

and

Davidson v. Hill, 2 K. B. 606 (1901),

disapproving

Adams v. British & F. S. S. Co., 2 Q. B. 430 (1898).

In the case of

> Patek v. American Smelting & Refining Co., 154 Fed. 190 (1907),

Mr. Justice Van Devanter, now a member of this Court, sitting as Circuit Judge on the Eighth Circuit, after reviewing all the authorities *pro* and *con* up to that time, held that the great preponderance of the decisions was in favor of allowing a non-resident alien to recover and be included among the beneficiaries, although not expressly mentioned in the statute. He therefore interpreted the Colorado statute (Mills Ann. St., Sects. 1509, 1510), although silent on the subject, as intending to include therein non-resident aliens among those permitted to sue for a death caused by negligence.

Mr. Justice Van Devanter also decided in his opinion in this case that the natural and ordinary import of the language used in this statute included the relatives named, wherever they may reside and whatever may be their citizenship (pp. 191, 193, 194).

This would seem undoubtedly to be the authoritative expression on the subject and has been so understood, approved, followed and adopted since.

> Cetofonte v. Camden Coke Co., 78 N. J. 662 (1910);
> The Federal Employers' Liability and Safety Appliance Acts, Thornton, page 176;
> Workmen's Compensation, Boyd, Sect. 500.

In fact, Mr. Justice Day, of this Court, in construing and applying the Alien Immigration Act of February 20, 1907, employed the identical rule contended for here, when he said, *inter alia:*

"There is nothing in the terms of the Act showing the Congressional purpose to exclude from its provisions an alien who had previously married, etc., etc."

Low Wah Suey v. Backus, 225 U. S. 460, 476 (1912).

In accordance with the above rules for interpretation and construction of the language of a statute as promulgated by this Court, there would seem to be but one logical and proper course for this Court to pursue.

A very close analogy in construing a similar statute (although State) by this Court can be found for so asking.

In

Dennich v. Railroad Co., 103 U. S. 11, 17 (1880),

where the question was whether for a person killed in New Jersey an administrator appointed under the laws of New York could bring suit in the New York courts under the New Jersey statute on behalf of the widow also residing in New York, and this court decided in the affirmative, this Court, through Mr. Justice Mitchell, says:

"It is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

"It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the

question whether it is a statutory right or a common-law right.

"Wherever, by either the common-law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

In the above decision, also, this Court says further:

"But it is said that, conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction.

"The statute does not say this in terms. 'Every such action shall be brought by and in the names of the personal representatives of such deceased person.' It may be admitted that for the purpose of this case the words 'personal representatives' mean the administrator.

"The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. THE ADVOCATES OF THIS VIEW INTERPOLATE INTO THE STATUTE WHAT IS NOT THERE, BY HOLDING THAT THE PERSONAL REPRESENTATIVE MUST BE ONE RESIDING IN THE STATE, OR APPOINTED BY ITS AUTHORITY. THE STATUTE SAYS THE AMOUNT RECOVERED SHALL BE FOR THE EXCLUSIVE BENEFIT OF THE WIDOW AND NEXT OF KIN. WHY NOT ADD HERE ALSO, BY CONSTRUCTION, 'IF THEY RESIDE IN THE STATE OF NEW JERSEY'?

"It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say that it depends on the appointment of an administrator within the State?"

This language is in entire accord with the contention of plaintiff in error in the present case.

The words of the Act of April 22, 1908, on this subject are as follows:

> "That every common carrier by railroad while engaged in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, *to his or her personal representatives*, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

In the present case the plaintiff resides in Philadelphia, Pennsylvania, and the letters of administration were taken out in the ordinary way under the laws of Pennsylvania. The plaintiff is therefore entirely within the jurisdiction of and amenable to the courts of the United States. In the language of the above decision, "The plaintiff is, then, the only personal representative in existence, and the construction thus given the statute (by the lower court) is, that such a suit shall NOT be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the" statute means that the persons for whose benefit the recovery is to be had are limited "by construction, if they reside in the" United States. "It is obvious that nothing in the language of the stat-

ute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say that it depends on the'' fact that the parties for whose benefit the recovery is sought must reside within the confines of this Country.

Unless, indeed, it is to be the established policy of this Country that the rights and remedies enjoyed under its general laws by the citizens and residents of the various sister States shall not be extended to the personal representatives therein residing acting for citizens and residents of other and foreign countries.

Wharton on the Conflict of Laws, Sec. 483a.

That such is not the intended policy, however, seems apparent from the many official expressions and authoritative decisions at various times in this Country.

This brings us to the fifth head of plaintiff in error's presentation of her discussion.

UNDER THE GENERAL AND ACCEPTED POLICY OF THIS COUNTRY PLAINTIFF IN ERROR SHOULD BE ALLOWED TO RECOVER IN HER PRESENT SUIT.

The policy of the United States, in all cases of complaints made by foreigners, is to extend to them exactly the same means of redress, as is enjoyed by our own citizens.

Wharton on Conflict of Laws, Sec. 17, et seq., and Secs. 478, 478a, 705, 737, 743.

Especially true in these latter days, when we boast as a Nation of being the foremost exponent of such

things as "universal peace" and the "eternal brotherhood of man," would any other policy of construction of our laws be utterly inconsistent with such national expressions and our declared undertakings and intentions?

To quote one of the decisions of our sister country, Canada,

> Varesick v. The British Columbia Copper Co., Ltd., supra,

for our courts to so interpret our compensation and liability laws as

> "to confine such dependents within geographical boundaries, or boundaries of any sort, would seem absurd on the face of it."

For the United States courts to forbid that the citizens of any special State of the Union should enjoy the benefits and provisions of the Act of April 22, 1908, is, of course, unbelievable and unthinkable, yet the line which separates this country from foreign countries is just as imaginary and empirical as that which separates one State from another. All civilized countries, while friendly, at least, are connected together as one family.

> "We, the independent nations of Christendom, are associated together in a sort of commonwealth of States. To the ties of a common civilization between us are added those of numerous treaties, and of common deference to certain doctrines and rules of right and justice, which not only guide us in peace, but even govern and control us in the extremities of war."
>
> Hon. Caleb Cushing, Opinions of Attorney General, 1855, Vol. 7, page 229.

To show the incongruity of things, at one time the position was actually taken in argument that, in order

for aliens to recover in the Federal courts, they must be non-resident. This, this Court, through Mr. Chief Justice Marshall, denied, and said that neither the Constitution nor the Acts of Congress required that aliens should reside abroad to entitle them to sue in courts of the United States. This court, however, was careful not to say that if they did reside abroad they could not sue or recover.

Breedlove v. Nicolet, 7 Pet. 413, 431 (1833).

The transitory character of an action for a tort seems now to be well recognized, and the action is enforced wherever the defendant can be found, irrespective of the residence of the beneficial plaintiff.

Wharton on the Conflict of Laws, Secs. 478a, 480a;

Gardner v. Thomas, 14 Johnson (N. Y.), 134 (1817);

Dewitt v. Buchanan, 54 Barb. (N. Y.), 31 (1868);

Crashley v. Press Pub. Co., 179 N. Y. 27, 71 (1904);

Slater v. Mexican Natl. R. R. Co., 194 U. S. 120, 129 (1903);

Barrow Steamship Co. v. Kane, 170 U. S. 100, 112 (1897).

"In the courts of the United States, under the Constitution and laws, alien friends are entitled to the same protection of their rights as citizens."

Taylor et al. v. Carpenter, 3 Story, 458, 463 (1844).

3 Story, 458, 463 (1844).

"The courts of the United States in every State are at all times open to the subjects of a foreign power in friendly relations with them."

Hon. Richard Rush, Attorney General's Opinions, Vol. 1, 192 (1816).

"On the footing of comity, aside from positive law, the United States have no right to complain that one of its citizens (indicted for a crime in Great Britain) is not entitled to a privilege not accorded by Federal or State law to a subject of Great Britain (indicted for crime committed in the United States.)"

Hon. Henry Stanbery, Attorney General's Opinions, Vol. 12, pages 319, 325 (1867).

"A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona*, damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the States, in more or less conformity to what is known as Lord Campbell's Act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found."

says Mr. Justice Brewer, speaking for this Court in in

Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 448 (1897).

This language would seem to indicate that this Court regards the benefits of a recovery under such Acts as the Railroad Employers' Liability Act of 1908 as sweeping in effect, including therein everyone legally entitled to participate, irrespective of age, race, color or residence.

This idea, theory, doctrine or interpretation seems to have been reaffirmed by this Court, through Mr. Justice Lurton, in the broad language of the decision under the Railroad Employers' Liability Act of

Michigan Central R. R. Co. v. Vreeland, supra, pages 65, 67, 68 and 69 (1912);

as well as through Mr. Justice McKenna, in the decision of

American R. R. Co. of Porto Rico v. Birch, 224 U. S. 547 (1912);

and in the late decision of

Taylor, Adm. v. Taylor, 232 U. S. 363 (1914).

In the dissenting opinion by Mr. Justice Field, in

Fong Yue Ting v. United States, 149 U. S. 698, 754 (1892),

although differing from the majority of Justices of this Court in the final finding he utters this statement, which statement, by itself, is in no way opposed to the belief of the majority:

> "They (aliens, whether resident or non-resident) differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guarantees of the Constitution. To hold that they are subject to any different law or less protected in any particular than other persons, is in my judgment to ignore the teachings of our history, the practice of our government, and the language of our Constitution."

It is respectfully submitted that these words, when rightfully understood and not applied to the sovereign right to exclude or deport, are logical, practicable, politic and legal, and that they are peculiarly appro-

priate and pertinent to the circumstances of the present case and should control its decision.

The sixth assignment of error is to the refusal of the District Court below to change its order directing a new trial to an order entering judgment in favor of the defendant, *when said order was based upon the finding of the jury of a material fact, not opposed to said finding and not finding said fact contrary to the jury's finding, and plaintiff was willing to stipulate that the evidence at any new or second trial would be the same, and plaintiff also, in view of the court's findings of law, waived her rights to a new trial.*

When, after the first trial, the district judge, who was also the trial judge, ordered a new trial, he did so in these words (page 84 of the Record):

> "It is concluded that the action cannot be maintained for the benefit of the parents of the deceased and that the defendant's request for binding instruction should have been granted. A new trial is therefore ordered."

Presumably the trial judge did this on the authority of

> Slocum v. New York Life Ins. Co., 228 U. S. 364 (1913).

But this language indicates, as well as the rest of the opinion, that the *district judge made this order on and by reason of the finding of fact by the jury, and not in disregard to such finding.*

Therefore, the question decided by the district judge became in reality one of law and not of fact. Instead of ordering judgment to be entered for the defendant, predicating his finding of law against the plaintiff in error upon the affirmative finding of fact

by the jury, which finding of fact by the jury was upon clear, uncontradicted evidence of plaintiff and her witnesses—in fact, plaintiff's sole case—the district judge orders plaintiff in error to try her case again in order to prove anew the same undisputed facts so that the lower court could again rule against her.

In other words, the court below said:

> "You must set up the pins again, and at your own expense; but we warn you, if you do, we will knock them down again."

Whether or not this is the real meaning of the Slocum decision, it is certainly an almost insufferable and burdensome construction and application of this decision in a case where a plaintiff was necessarily already put to heavy expense, could not, in the very nature of the circumstances, recover a large verdict, where the trial judge refused to decide this point at the trial, and where all doubtful conclusions of law were afterwards resolved against the plaintiff by the court below.

Undoubtedly the Slocum decision is a most wise, helpful and equitable one, and is intended to apply to cases, *where there is a material fact at issue between the parties*, so that the court cannot find contrary to the jury's ascertainment of such fact, and in all such cases a new trial must be ordered.

> Slocum v. New York Life Ins. Co., supra, pages 376 to 400;
>
> Vide also article, New Trials and the Seventh Amendment, by Prof. Henry Schofield, Vol. VIII, Illinois Law Review, December, 1913, January and February, 1914, numbers, pages 294, 295, 307, 308, 390, 391, 399.

In the present case there was no material fact at issue so far as regards the evidence of the beneficiaries of any recovery, but that fact was conceded, undisputed, and proved by plaintiff in error herself. The jury accordingly found the fact, of course, in her favor. The determination of the point of law against plaintiff in error by the District Court was *founded on this finding of fact by the jury* and *not in opposition to this finding of fact.* Hence, a new trial was not necessary, and the case should have been in a position immediately for a writ of error without the additional expense and delay of a new trial.

Therefore, plaintiff in error, as soon as she was apprised of the fact that the legal question involved had been and would always be decided against her by the lower court, filed a stipulation (page 84 of Record) reciting the facts, conceding the further proof of this vital fact at a subseqent trial, and waiving (as she was forced to because of the lower court's findings) her rights to a trial by jury.

It is submitted plaintiff in error could with propriety and full power do this.

Barney v. Schmeider, 9 Wall. 248 (1869);
Hodges v. Easton, 106 U. S. 408 (1882);
Baylis v. Travelers' Ins. Co., 113 U. S. 316 (1885);
Slocum v. New York Life Ins. Co., supra.

The District Court, nevertheless, refused to allow or act upon this stipulation and waiver of a jury trial by plaintiff in error, and obliged her to go to the added expense, delay and inconvenience of a second trial of this case.

It is submitted in so doing the District Court committed error.

It is, therefore, most respectfully submitted, that, upon this whole record, the finding of law by the District Court for the Eastern District of Pennsylvania should be reversed, and that the verdict obtained by plaintiff in error at the first trial below should be reinstated, without the necessity of a third trial.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

FILED
SEP30 1914
JAMES D. MAHER
CLERK

No. 999. October Term, 1914.

IN THE

Supreme Court of the United States

BRIDGET McGOVERN, Administratrix of the Estate of PETER McGOVERN, Deceased,
Plaintiff in Error and Plaintiff Below.

VS.

PHILADELPHIA & READING RAILWAY COMPANY, a corporation of the State of Pennsylvania,
Defendant in Error and Defendant Below.

Writ of Error to the District Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR DEFENDANT IN ERROR

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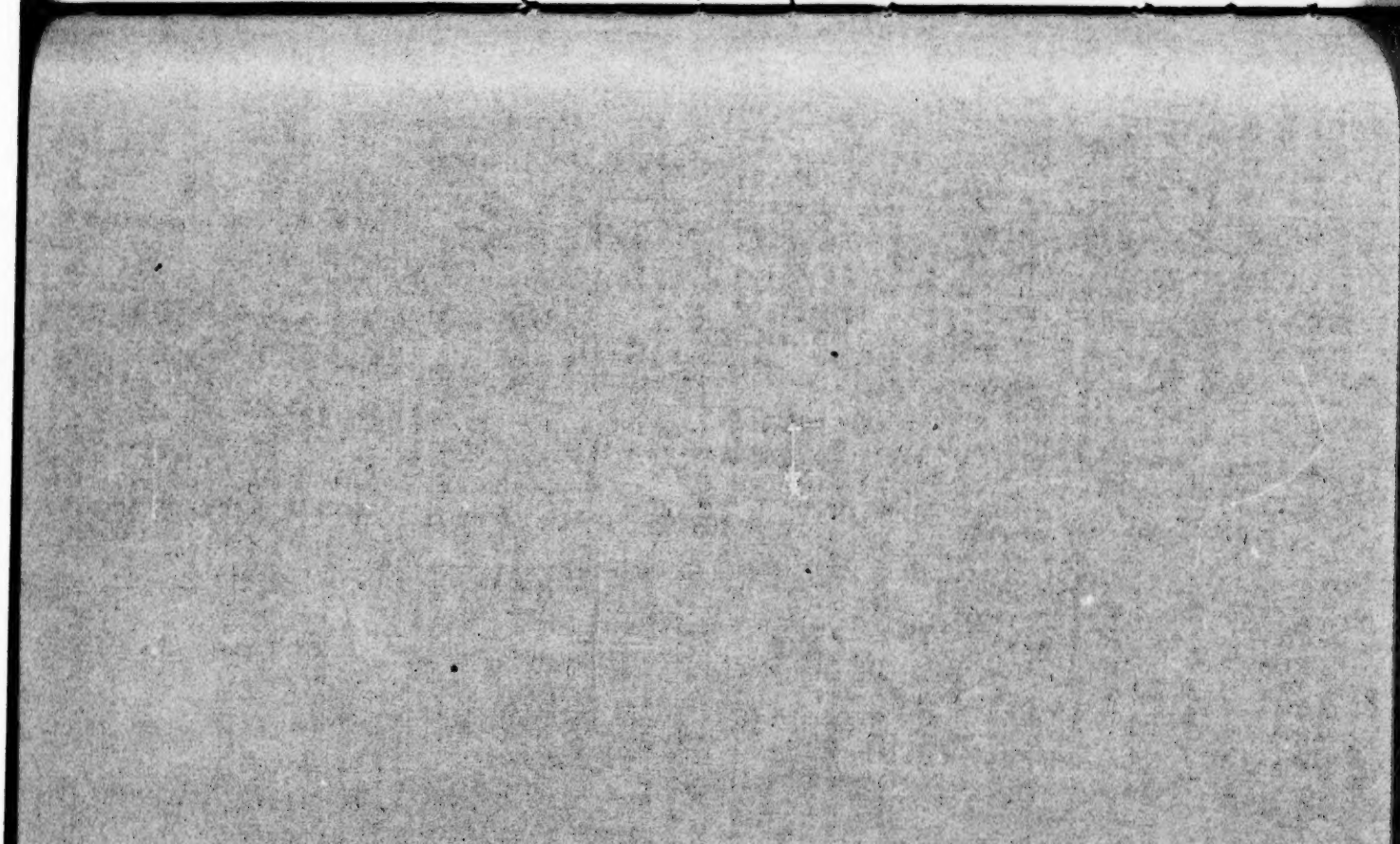

INDEX

PAGE

Statement of the Case 1

Argument:

1. The trial judge was correct in affirming the defendant's point, to the effect that plaintiffs, being non-resident aliens, had no right of action under the Act of Congress of April 22, 1908, &c. 2

2. The record justified the action of the trial judge in directing the jury that "Under all the evidence the verdict should be for the defendant," for two reasons:

   A. The deceased employee assumed the risk of his employment 13

   B. The non-resident alien plaintiffs were not dependent upon the deceased employee for maintenance and support . . 27

The case may not have been properly brought before this Court by the direct writ of error 35

CASES CITED

Adam v. British & F. S. S. Co., 2 Q. B., 430 12
Aerkfetz v. Humphreys, 145 U. S., 418 27
American Railroad Co. v. Didricksen, 227 U. S., 145 34
Crowe v. Railroad Co., 70 Hun., 37 25
Connelly v. Pennsylvania Railroad Co., 201 Fed. Rep., 54 25
Colorado Central Mining Co. v. Turk, 150 U. S., 138 37
Davis v. Concordia Parrish, 9 Howard, 280 4
Davidson v. Hill, 2 K. B., 606 12
Farrugia v. Philadelphia & Reading Ry. Co., 34 Sup. Ct. Rep., 591 . . 35
Filhiol v. Maurice, 185 U. S., 108 37
Gillman v. Philadelphia, 3 Wallace, 713 13
Goodtitle ex dem Pollard v. Kibbe, 9 Howard, 471 13
Gulf &c. Railway Co. v. McGinnis, 228 U. S., 173 34
Hertz v. Woodman, 218 U. S., 205 13
Hijo v. United States, 194 U. S., 315 38
Jecker v. Magee, 9 Wallace, 32 4
Maiorano v. Baltimore & Ohio R. R. Co., 213 U. S., 268 9
Michigan Central R. R. Co. v. Vreeland, 227 U. S., 59 33
Muse v. Arlington Hotel Co., 168 U. S., 430 37
Nye v. Pennsylvania R. R. Co., 178 Pa., 134 24
Norfolk & W. R. Co. v. Gesswine, 144 Fed. Rep., 56 26
Peterson v. American Ice Co., 83 N. J. L., 579 25
Seaboard Air Line Ry. v. Horton, 34 Sup. Ct. Rep., 635 21
Southern Railway Co. v. Crockett, 34 Sup. Ct. Rep., 897 23
Sloan v. United States, 193 U. S., 614 37
Stephens v. Cherokee Nation, 174 U. S., 445 38
Sanchez v. United States, 216 U. S., 167 38
Thomas v. Gay, 169 U. S., 264 38
Winfree v. Northern Pacific Ry. Co., 227 U. S., 296 4

IN THE

Supreme Court of the United States

October Term, 1913. No. 993.

Bridget McGovern, Administratrix of the Estate of Peter McGovern, Deceased,
Plaintiff in Error and Plaintiff Below,

vs.

Philadelphia and Reading Railway Company, a corporation of the State of Pennsylvania,
Defendant in Error and Defendant Below.

STATEMENT OF THE CASE.

This was the second trial of a suit brought by Bridget McGovern, administratrix of the estate of Peter McGovern, an employee of the Philadelphia and Reading Railway Company, killed while engaged in cleaning snow from the tracks of the Railway Company, being used in interstate commerce, at 9 A. M. on December 24, 1912, when there was mist, smoke and occasional flurries of snow.

The tracks upon which he was working were in constant use and the movements of trains upon them was obvious to all of the employees.

McGovern was killed by an express train running from Jersey City to Philadelphia. He had been engaged as a section hand or laborer for more than a year prior to his death, and was thoroughly familiar with the use of the tracks at that place and the operation of trains upon them.

The learned trial judge in affirming two points for charge presented by the defendant directed a verdict in its favor, upon which judgment was entered, and an appeal taken from the District Court of the Eastern District of Pennsylvania to this Court.

ARGUMENT.

The defendant railway company and its employee, Peter McGovern, whose parents are represented by the plaintiff as administratrix, were both engaged in interstate commerce at the time of his death, and therefore the law governing this case is the Employers' Liability Act of Congress, approved April 22, 1908, and its supplements.

The two points affirmed by the trial judge are as follows:

> "3. The evidence in this case, which is uncontradicted, shows that the parents of the decedent, to wit, Patrick McGovern and Bridget McGovern, for whose benefit this action is brought under the Act of Congress of April 22, 1908, as amended April 5, 1910, are non-resident aliens, being citizens of and residents in Great Britain, and therefore they have no right under the Act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant."
>
> "4. Under all the evidence in this case the verdict should be for the defendant."

The defendant contends that the *first point* affirmed by the learned judge is a correct statement of the law that should be applied to the facts presented by this record in view of the decisions of this Court, and also that there can be no doubt that the record amply justifies the directed verdict under the *second point*, and therefore the defendant submits that the judgment of the District Court be affirmed.

1. The learned trial judge was correct in affirming the following point presented by the defendant:

> **"3. The evidence in this case, which is uncontradicted, shows that the parents of the decedent, to wit, Patrick McGovern and Bridget**

McGovern, for whose benefit this action is brought under the Act of Congress of April 22, 1908, as amended April 5, 1910, are non-resident aliens, being citizens of and residents in Great Britain, and therefore they have no right under the Act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant."

The Employers' Liability Act of Congress of April 22, 1908, Section 1, provides as follows:

> "That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents, and if none, then to the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

There is no proviso that the terms and benefits thereof shall be extended to include non-resident aliens, and, therefore, in the light of judicial interpretation, the benefits or provisions of the Act must be limited to those persons beneficially interested in it who are within the jurisdiction of the Courts of the United States.

There are many words and much argument in the brief for the plaintiff in error concerning the decisions of Pennsylvania pertaining to its common law and its statutes, and there is also serious argument advanced concerning the treaty between the United States of America and Italy proclaimed July 3, 1913.

In view of the evidence in this case that the death of Peter McGovern occurred while he was engaged in interstate commerce in the employ of the defendant railway company, and that the accident which caused his death occurred December 24, 1912, neither the law of Pennsylvania nor the treaty of July 3, 1913, with Italy, can have the slightest bearing upon the decision of this case.

The treaty with Italy can have no retroactive effect, as the rights of the parties involved were fixed and determined upon the 24th day of December, 1912.

Winfree v Northern Pacific Railway Co., 227 U. S., 296; 33 Supreme Ct. Rep., 273.

Davis v Concordia Parish, 9 Howard, 280.

> "All treaties are binding upon the contracting parties, unless otherwise provided, from the day they are signed."

Jecker v Magee, 9 Wallace, 32.

> "So far as it affects individual rights, a treaty is not concluded until exchange of ratifications."

In setting aside the verdict rendered in the first trial of this case and granting a new trial to the defendant, the learned trial judge of the court below rendered the following opinion:

> THOMPSON, *J.*
>
> The plaintiff brought suit as administratrix of Peter McGovern, deceased, against the Philadelphia and Reading Railway Company under the provisions

of the Act of April 22, 1908, known as the Employers' Liability Act, and its amendment, to recover damages for the death of Peter McGovern. The action is alleged in the statement of claim to be for the benefit of Patrick McGovern and Bridget McGovern, the surviving parents of the deceased.

At the trial it appeared that Patrick McGovern, the father, and Bridget McGovern, the mother, of the decedent, for whose benefit action was brought, are citizens of the Kingdom of Great Britain and Ireland and residents of Ireland. At the conclusion of the plaintiff's testimony, the defendant submitted *inter alia* the following point for charge, which was refused by the Court:

"3. The evidence in this case, which is uncontradicted, shows that the parents of the decedent, to wit, Patrick McGovern and Bridget McGovern, for whose benefit this action is brought under the Act of Congress of April 22, 1908, as amended April 5, 1910, are non-resident aliens, being citizens of and residents in Great Britain, and therefore they have no right under the said Act of Congress for which this suit may be maintained, and you are therefore directed to render a verdict in favor of the defendant."

The refusal of the above point is assigned as error and reason for a new trial. The Act, under which the suit is brought, establishes a new liability upon common carriers engaged in interstate commerce by which, in case of the death of an employee under the circumstances of negligence set out in the Act, the carrier is liable to damages "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."

Under the Pensylvania Statute of April 26, 1855, P. L. 309, permitting certain named relatives to recover damages for death occurring through negligence, it has been held that a non-resident alien has

no standing to maintain such an action against a citizen of Pennsylvania. As was stated by Mr. Justice McCollum, in the case of Deni v. Pennsylvania Railroad Co., 181 Pa., 525:

"Our statute was not intended to confer upon non-resident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include non-resident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it. A non-resident defendant is not entitled to the benefit of our exemption laws, although the language of these laws may admit of a construction which would include him. It has been so held in a number of our cases. In this conection the language of Mr. Justice Sterret, in Collom's Appeal, 2 Pennypacker, 130, is pertinent. In delivering the opinion of the Court he said:

" 'While non-resident debtors may perhaps be within the letter of the act, we do not think they are within its spirit. As was said by Mr. Justice Woodward in Yelverton v. Burton, 2 Casey, 351, and afterwards quoted approvingly by the present Chief Justice in McCarthy's Appeal, 18 P. F. Smith, 217, we do not legislate for men beyond our jurisdiction.'

"In one respect, at least, our Act of 1855 resemsembles our exemption laws. It is intended, primarily, for the benefit of the family of which the deceased was a member. * * *

"We have a number of statutes which expressly confer rights upon aliens, but none which confers them by implication or inference. When the legislature intends to concede to non-resident aliens the rights which our own citizens have under and by virtue of the Act of April 26, 1855, it will say so."

The Deni case was followed in the case of Maiorano v. Baltimore and Ohio Railroad Company, 216 Pa., 402, where it appeared that the plaintiff was a resident of the Kingdom of Italy and a subject of the King of Italy, and it was claimed that under the treaty between the United States and Italy the plaintiff was entitled to the same rights as citizens of the United States. Act 3 of the treaty provides:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting to the conditions imposed upon the natives."

It was held by the Supreme Court of Pennsylvania that the provisions in the treaty above referred to apply only to such citizens of Italy, as either with respect to their persons or property, are within the jurisdiction of the United States, and that the Act of 1855 did not entitle an alien non-resident to sue.

The decision in Deni v. Pennsylvania Railroad Company was followed by the Circuit Court of Appeals for this Circuit in the case of Fulco v. Schuylkill Stone Co., 169 Fed., 98, and by the Circuit Court of the District of Colorado in the case of Brannigan v. Union Gold Mining Company, 93 Fed., 164. The Circuit Court for the District of Washington in the case of Roberts v. Great Northern Ry. Co., 161 Fed., 239, in interpreting a statute of the State of Washington, arrived at the same conclusion. The case of Maiorano v. Baltimore and Ohio Railroad Company was taken on error to the Supreme Court of the United States. Mr. Justice Moody, in rendering the opinion of the Court, 213 U. S., 268, held that the construction of the State statute by the highest Court of the State must be accepted by the Federal Supreme Court. He further decided, however, that a fair construction of the treaty between the United States and the

King of Italy, under which the plaintiff claimed, did not confer upon a non-resident citizen of Italy the rights bestowed upon citizens to maintain actions of this sort. In concluding, Mr. Justice Moody said:

"If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of action for himself or his personal representatives to safeguard the protection, and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety."

While the right of a non-resident alien to recover under the Federal Employers' Liability Act has not been passed upon, I think the reasoning in the cases of Deni v. Railway Company and of Maiorano v. Baltimore and Ohio Railroad Company may well be applied to the statute in question. It is not to be presumed that Congress intended to legislate for the benefit of persons residing out of the jurisdiction of the State and Federal laws. The right to recover damages for death is not a right at common law, and when Congress undertakes to impose a liability upon interstate carriers for the benefit of their employees and the relatives of their employees in case of death through the carrier's negligence, in the absence of any provision to the contrary in a treaty or Act of Congress, it must be presumed that such benefits are not intended for non-resident aliens.

Counsel for the plaintiff calls attention to the treaty with Italy signed at Washington on February 25, 1913, under which the citizens of Italy are said to be entitled to exactly the same rights as the citizens of this country in the courts of this country, although at the time of the occurrence the citizens of Italy may be residing abroad. It is urged that under the most favored nation clause in the treat-

ies between this country and Great Britain and Ireland, the latter countries are entitled to the benefits and the rights arising under this treaty with Italy. Even if citizens of Great Britain derive the benefits claimed under the late treaty with Italy, that circumstance has no bearing on the question for whatever rights the plaintiffs have in this case arose prior to the adoption of the treaty with Italy, as the death is alleged to have occurred on December 24, 1912.

It is concluded that the action cannot be maintained for the benefit of the parents of the deceased and that the defendant's request for binding instructions should have been granted.

A new trial is therefore ordered. Defendant's motion for judgment *n. o. v. is* overruled.

The case of **Maiorano v Railroad Co.,** 213 U. S., 268, is relied upon by the learned trial judge of the court below, and by this defendant, as an expression by this court favorable to the contention made here, that as the Act of Congress failed to expressly extend its benefits to non-resident aliens, it shall not be so extended by judicial legislation; and that if it is the intent of Congress to include non-resident aliens in the benefits of that statute, then it must add to the Employers' Liability Act an amendment similar to that passed by the Legislature of Pennsylvania under similar circumstances.

In Maiorano v. Railroad Co., supra, this Court, interpreting, as it did, a treaty which was silent upon the subject, was then in the same position as this Court is now when asked to interpret the Act of Congress also silent, and because of such silence to be interpreted in the same manner. This Court, speaking by Mr. Justice Moody, said in **Maiorano v Railroad Co.,** supra:

> "We put our decision upon the words of the treaty. By a fair interpretation of them, did they

directly confer upon the plaintiff the right which she seeks to maintain? We are of opinion that they did not."

(pp. 274-275):

"Article 23 bestows upon citizens of either power, whether resident or non-resident, free access to the courts, 'in order to maintain and defend their own rights,' with the ancillary privileges of suitors. This article does not define substantative rights, but leaves them to be ascertained by the law governing the courts, and administered and enforced in them.

"Articles 2 and 3 deal with the rights of the citizens of one party sojourning in the territory of the other. There seems to be nothing pertinent to the case in article 2. But special stress is laid upon article 3, which stipulates for the citizens of each, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of person and property. It cannot be contended that protection and security for the person or property of the plaintiff herself have been withheld from her in the territory of the United States, because neither she nor her property has ever been within that territory. She herself, therefore, is entirely outside the scope of the article. The argument, however, is that if the right of action for her husband's death is denied to her, that he, the husband, has not enjoyed the equality of protection and security for his person which this article of the treaty assures to him. It is said that if compensation for his death is withheld from his surviving relatives, a motive for caring for his safety is removed, the chance of his death by unlawful violence or negligence is increased, and thereby the protection and security of his person are materially diminished. The conclusion is drawn that a full compliance with the treaty demands that, for his protection and security, this action by his surviving relatives should lie. The argument is not without force. Doubtless one reason which has induced legislators to give to surviving relatives an action for death has been the

hope that care for life would be stimulated. This thought was dwelt upon in Mulhall v. Fallon (supra), in considering a statute which made the amount recoverable dependent up the degree of culpability of the negligent person. Another reason for such legislation, quite as potent, was the desire to secure compensation to those who might be supposed to suffer directly and materially by the death. This thought seems to have been uppermost in Pennsylvania, according to the courts of that State. See Chambers v. Baltimore & O. R. Co., 207 U. S., 142, 52 L. ed., 143, 28 Sup. Ct. Rep., 34, and cases cited. Without dwelling further upon the purpose and effect of legislation of this kind, and assuming that both might be calculated in some degree to increase the protection and security of persons who may be exposed to dangers, we are of opinion that the protection and security thus afforded are so indirect and remote that the contracting powers cannot fairly be thought to have had them in contemplation.

"If an Italian subject, sojourning in this country, is himself given all the direct protection and security, affored by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety."

It is urged that, even though the treaty with Italy cannot be antedated and become retroactive, still by the international law, and the law of comity, this court should declare that as the non-resident alien parents of the deceased are citizens of Great Britain, and as the most recent decision of the courts of England have been favorable to certain non-resident aliens, they should be adopted as controlling in the case at bar.

It is true that "comity" like public policy is a horse available to many riders, who otherwise would be forced to walk upon the hard road of discouragement, but also, like public policy, comity may be ridden to death.

The attempt to make avail of the theory of reciprocity in the present instance ignores the facts in the cases decided by the courts of Great Britain that are essential to the invocation of such a rule. Unfortunately for the plaintiff in error no case can be found in the reported decisons of the courts of Great Britain where the non-resident alien benefited thereby was an American citizen.

It is also a matter of at least passing interest to realize that the courts of Great Britain are by no means in accord, and until there has been a decision by the court of last resort of the empire, the lower courts may still take their choice and indulge their individual preferences.

On the one hand it is true that the case of **Davidson v Hill,** 2 K. B., 606, sustains the right of a non-resident alien widow to recover for the death of her husband, but the contrary rule was laid down in **Adam v British & F. S. S. Co.,** 2 Q. B., 430.

It is difficult to see, therefore, great weight in the argument that the decisions of a country at conflict with each other and none of them in favor of a non-resident alien citizen of the United States should be adopted by this court in the way suggested by the plaintiff in error.

There is little help to be gained by a review of the decisions of the State courts and the lower Federal courts of the United States. They are in hopless conflict upon this question, and if this appeal accomplishes no other good purpose it may at least afford an opportunity to this court to affirm in no uncertain terms the opinion of Mr. Justice Moody in **Maiorano v Railroad Co.,** supra, as the supreme law of the land applicable to cases aris-

ing under the Federal Liability Act. That decision if correctly interpreted by the defendant in error establishes the precedent for this case, and upon the theory so often enunciated by this court of stare decisis it should be followed now.

Gilman v Philadelphia, 3 Wallace, 713.

A rule of law once fixed by the Court should be firmly adhered to unless clearly erroneous.

Goodtitle ex dem. Pollard v Kibbe, 9 Howard, 471.

The case must be strong and one where mistake and error have evidently been committed to justify the Court in reversing its own decision.

Hertz v Woodman, 218 U. S., 205.

2. The judgment in favor of the defendant must be affirmed because the record justifies the action of the learned trial judge in directing the jury that "Under all the evidence in this case your verdict must be for the defendant."

The general direction to render a verdict in favor of the defendant may be sustained upon either of two reasons:

A. The deceased employee assumed the risk of the use of the track upon which he was working by the train which caused his death.

The following testimony shows the character of the work in which McGovern was engaged, and the obvious risks incident thereto.

Antonio Parento (Record, pp. 27, 28, 30, 32, 33).

"Q. Was Peter McGovern a member of your gang of section hands?

"A. He was. We were together.

* * * * * * * * * * *

"Q. At what time in the morning was this? Was this in the morning or afternoon?

"A. It was between eight and nine A. M.

"Q. Eight A. M.?

"A. Yes.

"Q. What were you doing there at that place? What were all you men doing?

"A. Moving snow from the tracks.

"Q. What did you have for that purpose? Shovels, I suppose?

"A. Brooms. We just used brooms.

"Q. Just brooms.

"A. That is all.

* * * * * * * * * * *

"Q. What were the conditions of the air at this place at this time?

"A. Very badly, snowing, windy, and smoking, and everything else, and trains were coming in and out. It was very windy and snowing.

"Q. There was something else you said?

"A. Trains were coming in and out.

"Q. Was there any smoke or steam?

"A. Smoke, yes. The smoke was very dense.

"Q. Was the smoke lying low, or high?

"A. Low.

"Q. Were you able to see this New York train before it came along at that place?

"A. No, sir; I could not.

"Q. Was there any watchman or any lookout stationed to warn the men of a train coming on that track before McGovern was struck?

"A. It may be, but I don't know. There was not anything near where I was.

* * * * * * * * * * *

"Q. Which train was it that struck McGovern? The Norristown train or the New York train?

"A. The New York train.

"Q. The New York train?

"A. Yes.

"Q. Did the New York train run on the same track that the Norristown train ran on?

"A. No, sir.

"Q. How many tracks were there at that point?

"A. Two or three or four; I am not precise, as to the numbers of the tracks. The weather was too stormy and windy and snowy and smoking, that I could not exactly say.

"Q. When the boss called "look out" just before the Norristown train came, as you have stated, what did you and the other men do?

"A. We stepped out from the track, and went close by to the ditch. We were looking out for the Norristown train, though.

"Q. Then, after you did that, what happened immediately after that?

"A. About a half minute after, no one of us knew that the train was coming, and then one of my fellow workingmen called my attention, he said, 'Look, somebody is killed on the track.'

"Q. Which train is that you are talking about now?

"A. The New York train.

"Q. And which track was that with reference to the track that the Norristown train was on? Was it the next track to the track the Norristown train was on?

"A. The next track."

Domenico DiMassenio (Record, pp. 36, 37-38, 39, 40).

"Q. Were you the foreman?

"A. Yes, sir.

"Q. Of this gang of laborers at the time that McGovern was killed?

"A. Yes, sir.

"Q. How many men had you in the gang?

"A. Thirty.

"Q. Thirty?

"A. Yes. Twenty men working at the Sixteenth Street Junction, and ten men working at Brown street.

"Q. Twenty men working where?

"A. Twenty men working at the Sixteenth Street Junction and ten men working on Brown street on the twenty-fourth of December, 1912.

"Q. Where was McGovern working?

"A. McGovern was working for me at the Sixteenth Street Junction.

"Q. The Sixteenth Street Junction?

"A. Yes.

"Q. And what were they doing up there that morning?

"A. I go there to clean the snow.

"Q. What time did you go up there?

"A. I started to work at 3.40.

"Q. 3.40 in the morning?

"A. Yes, sir.

"Q. Do you remember the day of this accident? Do you?

"A. Yes, sir.

"Q. What day was it?

"A. The twenty-fourth of December, last December, 1912.

"Q. What time of the day, about, did it happen?

"A. About 9.20.

* * * * * * * * * * *

"Q. Where was McGovern?

"A. McGovern was working on No. 2.

"Q. McGovern was working on the Norristown track with the gang?

"A. No.

"Q. Which track was he working on?

"A. No. 2, New York.

"Q. The New York track?

"A. Yes.

"Q. That was alongside of the Norristown track, was it? Was No. 2 directly alongside of No. 4?

"A. New York, coming to Philadelphia, No. 2 track, and when the Norristown train was there, it was a little bit slack, but the steam and the smoke and the snow blew on the track across, and I did not the New York train. I guess the tower man

let her pass the New York train first, I don't know, because that is not my business, I don't know, but the New York train passed first because the Norristown train was slack, and I got Peter McGovern employed there to work there, cleaning out, and when the New York train went past it knocked Faetti down, and he touched me on my leg, too, and knocked me down, and when I got up I saw Peter McGovern on the other side of the ditch there. Peter McGovern worked right there in the center of switch No. 2.

"Q. Do I understand you to say that you were knocked down, too, by the train?

"A. Yes, sir.

"Q. How many men were knocked down by this train?

"A. The train did not knock me down. Faetti knocked me down. The man knocked me down.

* * * * * * * * * * *

"Q. You have said it, in different parts of your testimony, or in your statement, but I want to get it perfectly clear, so that we will all understand it —what was the condition of the atmosphere, the weather that day?

"A. It was bad weather.

"Q. What kind of weather?

"A. Snow.

"Q. Was there any steam or smoke about there?

"A. Yes, steam and smoke from the Norristown train, it was there at the Sixteenth Street Junction by the Norristown train, which slacked a little bit, and the steam and the smoke and the snow covered all across the line.

* * * * * * * * * * *

"Q. How long had you been there before the accident happened?

"A. About five hours.

"Q. And how had the weather been during the whole of that time?

"A. Snow. It is bad weather.

"Q. And the trains had been passing backward and forward there during the whole of the five hours?

"A. Yes, sir; trains passed there all the time.

"Q. And you called to your men whenever you saw a train coming, to get out?

"A. I called to my men when I saw the Norristown train coming.

"Q. Every time?

"A. Every time I called to my men, every time, the number of the track. I called to my men all the time, because the trains pass there steady all the time.

"Q. Why didn't you call to them when you saw the New York train coming?

"A. I did not see the New York train. These fellows were working there attending to their work.

"Q. Why didn't you see the New York train?

"A. I did not see it, because it was a bad morning, snow, and the Norristown train was a little bit slack, and there was steam and smoke and snow in front of the New York train.

"Q. Then, when the Norristown train went by, the smoke and the steam from that train hid the New York train from your view? Is that it?

"A. Yes, sir.

"Q. You say McGovern was working on the New York track?

"A. Yes, sir.

"Q. How many other men were working there with him?

"A. I got three at that time.

"Q. Three?

"A. Yes.

"Q. Where were the other men working?

"A. The other men were in the ditch that is there."

Philip Cantondo (Record p. 43).

"Q. What kind of weather had you that morning?

"A. It is bad weather.

"Q. Tell us what you mean by that? What do you mean by 'bad'?

"A. Well, snow.

"Q. Snow?

"A. Snow.

"Q. Did you see the accident to McGovern?

"A. Yes, sir.

"Q. Tell us all you know about it?

"A. I see the first train coming. The foreman he called out, he said 'heads up.' That means the Norristown train.

"Q. The Norristown train? That was the Norristown train?

"A. Yes. Well, we started to work over there yet. There was another train coming behind that one, but that one makes smoke, the first train makes smoke. The first train makes smoke, and he go slow, you know. He make steam, smoke and steam.

"Q. You say the first train was running slow?

"A. Yes, sir.

"Q. That is the Norristown train?

"A. Yes, I think Norristown, I guess.

"Q. What track was that on?

"A. I don't know. I don't know whether No. 1 or No. 3. I don't know.

"Q. You don't know the number?

"A. No.

"Q. Go ahead.

"A. Well, after that train was slow over there, there is another train coming behind that one. That was called the New York train, and we did not see that train at all, it just came and knocked down two men over there, because it came fast."

John H. Drumheller (Record pp. 65-66, 70).

"Q. You were the section foreman of the Reading Railroad Company on this day, the day when the accident happened?

"A. Yes, sir.

"Q. And did you have occasion to go to where these men were working at the cross-over switches

there near the Sixteenth Street Junction before the accident happened?

"A. I was here all the morning, up to about twenty minutes before the accident happened. Then I was called to Diamond street for trouble.

"Q. What did you say, if anything, to the men, concerning the danger, and what they must do?

"A. I located the men there. I went down with Domenico, with his men. I had twelve section men, other section gangs, and I went down to Domenico, and located his men in his gang; he had twenty-eight men, or twenty-nine, and I located them in places right there, I can show you, in the switches, and also I cautioned him to be very careful, to watch out for his men, and had a watchman down at the Pennsylvania bridge, and there was a watchman up near the Seventeenth street bridge, about two hundred and fifty feet south of the Seventeenth street bridge.

"Q. What did you say to the men themselves? Did you say anything to them? Did you know McGovern?

"A. I knew McGovern; yes, sir.

"Q. Was he one of the men you said something to?

"Mr. Demming: That is objected to.

"A. He was one of the men; yes, sir.

"Q. Did you say anything to any other men?

"A. I did; yes, sir. I went to McGovern, I went and told him, the last word I said to him, I said, 'Look here, McGovern, be very careful, you are in a dangerous place.' I also had told the other section man, who was working for me, in the other gang, with McGovern, at this frog, the point where he was hit.

* * * * * * * * * * *

"Q. We will use the word 'instruction.' What instructions do these section men get with regard to trains coming?

"A. I told you about McGovern, they are told to be careful, to watch out for themselves, and depend

upon the foreman, of course. Sure. That is what we pay the foreman for.

"Q. And the watchman?

"A. And the watchman; yes, sir.

"Q. And if they get no word from the foreman or the watchman, they are compelled to work——

"A. They are to look out for themselves. No man should continue working if he sees a train coming."

The evidence in this case shows that the deceased employee was thoroughly familiar with the use of the tracks by trains moving at a fast rate of speed and under the weather conditions existing at the time he was chargeable with the knowledge that danger was imminent. By continuing in his employment, which required him to be upon the railroad tracks used continuously by fast trains, with the knowledge that the snow and steam and smoke from passing trains would obscure the view of coming trains, thereby increasing his danger, he assumed the risk which was obvious to him, and as he would not be entitled to recover from this defendant, if he were alive and suing for injuries, the present plaintiff is not entitled to recover for the benefit of his non-resident alien parents for the same reason.

The defence of assumed risk is available under the Employers' Liability Act in all cases where it is available at common law:

Seaboard Air Line Railway v Horton, 34 Supreme Ct. Rep., 635.

MR. JUSTICE PITNEY (pp. 639-640):

"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction be-

tween contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible.

"The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and *risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*"

Southern Railway Co. v Crockett, 34 Supreme Ct. Rep., 897.

MR. JUSTICE PITNEY (p. 899):

"The contentions of defendant, overruled by each of the State courts and here renewed, are, that by the true interpretation of the Employers' Liability Act, the common-law rule respecting the assumption of risk was not abolished except in cases where the violation by the carrier of some statute enacted for the safety of employees contributed to the injury of the employee; and that by the safety appliance act and amendments, as properly interpreted, the height or construction of the drawbars of locomotives was not regulated, so that the fact that the drawbar in question was only 30 inches high was not a violation of these acts, and hence afforded no ground for a recovery under the Employer's Liability Act.

"There is a motion to dismiss, based upon the insistence that the record presents no question reviewable in this court under section 237, Judicial Code (Act of March 3, 1911, Chap. 231, 36 Stat. at L. 1156, U. S. Comp. Stat. Supp. 1911, p. 227). The motion must be overruled, upon the authority of St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S., 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep., 464; Seaboard Air Line R. Co. v. Duvall, 225 U. S., 477, 486, 56 L. ed., 1171, 1175, 32 Sup. Ct. Rep., 790; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S., 265, 57 L. ed., 1179, 33 Sup. Ct. Rep., 858; Seabord Air Line R. Co. v. Horton, 233 U. S., 492, 499, *ante*, 635, 34 Sup. Ct. Rep., 635.

"Upon the merits, we of course sustain the contention that by the Employers' Liability Act the defense of assumption of risk remains as at common law, saving in the cases mentioned in section 4, that is to say: 'Any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of

such employee.' Seabord Air Line R. Co. v. Horton, 233 U. S., 492, 503 *ante*, 635, 34 Sup. Ct. Rep., 635."

At common law the facts in this case would have warranted a directed verdict in favor of the defendant, and therefore the action of the lower court in adopting this course of disposing of the case is sustainable by the following authorities:

Nye v Pennsylvania Railroad Co., 178 Pa. 134.

MR. JUSTICE MITCHELL (pp. 138-139):

"Passing from the particular evidence in this case to the general principles applicable to the subject, it is plain that track repairing or track clearing, in the vicinity of moving trains, is intrinsically a dangerous occupation. The men who went out to clear this blockaded train knew that the very object of so doing was to keep the track open so as to allow trains to run. The uncontradicted testimony is that the next track No. 2, on which the accident occurred, was only kept open by constantly running a locomotive backwards and forwards on it at this point. The decedent's work was not on this track, but on No. 1, and there was a clear space of seven feet between them. The representatives of the railroad company had no reason to suppose that he would voluntarily put himself into unnecessary danger by getting on track No. 2 or so near it as to be struck by one of its trains. It is a fair presumption not only that men take the risks of their employment, but that they are competent to keep themselves out of manifest and unnecessary exposure to danger. It is argued that the storm made the situation one of unprecedented peril to Nye and his fellows, and the court therefore could not say as matter of law that the railroad owed no unusual duty for the protection of its employees. But the situation was no more unprecedented for one than

for the other, and the danger though greater in degree was no different in kind from that under ordinary circumstances, and the more manifest the danger the more the employer was entitled to rely on the presumption that the employee would not unnecessarily incur it."

Crowe v Railroad Co., 70 Hun, 37.

LEWIS, J.:

Great care and caution are required on the part of railroad companies when they are moving cars in places where the general public have a right to pass, to in some manner announce their approach; but a different rule obtains in the companies' yards, where cars are being distributed and trains made up. The employees about such yards understand the situation; they know the manner of doing the business therein; that cars frequently pass along without notice of their approach, and they assume the risks incident to the business thus conducted.

Anton Peterson v American Ice Co., 83 N. J. L., 579.

Where the plaintiff, a carpenter of experience, was employed to repair a pitched roof upon defendant's shed, and, having worked thereon for two days, upon the third day slipped upon some snow and ice which collected while he was working, and fell from the roof, injuring himself. *Held*, that the danger incident to the snow and ice upon the roof was as obvious to the plaintiff as to the master, and was a risk assumed by the plaintiff in the performance of his work.

Ellen Connelly v Pennsylvania R. R. Co., 201 Fed. Rep., 54.

One employed as trackwalker to watch the tracks of a railroad and make small repairs takes the risk of injury from trains operated in a proper and

usual way, so that no recovery can be had for his death from collision with a train suddenly emerging from a cloud of steam and fog while he is engaged in tightening a bolt.

BUFFINGTON, C. J.:

"It is an obvious fact that many occupations, as for example a powder mill operator, a structural iron worker, a diver, a blaster, a trackwalker, necessarily subject those who follow them to great dangers. When, therefore, a man contracts for such employment, he knows and takes on himself the risks and dangers incident to such dangerous work. His assumption of those obvious and unavoidable risks is in the very nature of things part of his employment. It follows, therefore, that the employer violates no legal duty to the employee in failing to protect him from dangers which cannot be escaped by any one doing such work."

Norfolk & W. R. Co. v Gesswine, 144 Fed. Rep., 56.

"This man was one of a number of men who were employed as sectionmen on the railroad. They were engaged in repairing the track, taking out rails, putting in new ones, taking out cross-ties and putting in new ones, and hewing them into proper form and shape, and were working on the railroad track while the trains were being operated in the usual way; manifestly, a place of danger. A railroad does not suspend the operation of its trains until the track can be put in order, and the proposition to these sectionmen was: 'We will run the trains and operate the road as heretofore, as we ordinarily do, and between trains you must do this work and look out for yourselves to avoid being injured by the trains,' and the sectionmen accept the employment upon those terms, and if an accident occurs, and they are hurt while the trains are being managed and operated in the usual and ordinary way, they can have no just ground of complaint against the railroad. It is not the fault of the railway company."

Aerkfetz v Humphreys, 145 U. S., 418.

An experienced trackman was injured by a moving train in a switching yard.

"Under such circumstances, what negligence can be attributed to the parties in control of the train, or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employee familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming and switch engines moving forwards and backwards would have simply tended to confusion. * * * It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants."

B. The evidence in this case shows that the non-resident alien plaintiffs for whose benefit this suit was brought were neither of them dependent upon the deceased employee for maintenance and support at the time he was killed, and as the provisions of the Act of Congress of April 22, 1908, as amended, limit recovery under it to actual pecuniary loss suffered by dependent relatives the use plaintiffs in this case have no right to recover damages from the defendant.

It is provided by section one of the Employers' Liability Act as follows:

"* * * in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents, and if none, then to the next of kin *dependent* upon such employee * * *"

The testimony offered by the plaintiff to show the dependency of the non-resident alien parents of the deceased fails to arise to the standard required to bring it within that term. The testimony upon this phase of the case is as follows:

John McGoldrick (Record pp. 16-17, 18-21).

"Q. When you went the last time to Ireland did you see Patrick McGovern and Bridget McGovern?

"A. Yes, sir.

"Q. The father and mother of this young lady and of Peter McGovern?

"A. Yes.

"Q. Did you know Peter in his lifetime?

"A. Yes, sir.

"Q. And you know that they are the father and mother of Peter?

"A. Yes, sir.

"Q. How long have you known the family?

"A. Since I was able to walk.

"Q. Since you were able to walk?

"A. Yes.

"Q. Did you ever live in that neighborhood?

"A. Yes.

"Q. When did you see them last?

"A. In April last.

"Q. In April?

"A. Yes.

"Q. 1913?

"A. Yes.

"Q. Where did they live?

"A. They lived on a wee farm.

"Q. Where?

"A. On a farm.

"Q. In what part of Ireland?

"A. County Cavan.

"Q. Was that the same farm they lived on how long?

"A. Since I have ever known them.

"Q. Do they own the farm or rent the farm?

"A. They rent it.

"Q. How big a farm is it? How many acres?

"A. I could not exactly say how many acres it is.

"Q. Give us your best judgment. You have often seen it, have you not?

"A. Thirty-five acres, as far as I know. I am not a judge of acres. I am not a very good judge of acres.

"Q. You think about how many acres, do you say?

"A. About thirty-five acres.

* * * * * * * * * * *

"Q. Are Patrick McGovern and Bridget McGovern hard working people?

"A. Yes, sir.

"Q. Do they do daily work on this farm?

"A. Yes, always.

"Q. How many children have they in America, or had they at the time that Peter died?

"A. Two.

"Q. Peter and Bridget?

"A. Yes.

"Q. Do you know of your own knowledge whether Peter sent money to them when he was living over here?

"A. Yes, sir; I often heard he sent money home."

Cross-examined.

"By Mr Mason:

"Q. How many children did you say the McGoverns had when you left Ireland, living on the place?

"A. Five living on the place.

"Q. And then Peter and Bridget, who were in America?

"A. Yes.

"Q. That is the same place that they have had ever since you have known them, is it not?

"A. Yes, sir.

"Q. And they have been working on that place, and they raised their whole family on it?

"A. Yes.

"Q. And what else besides farming the place that they lived on did Peter do, or did Patrick do, if you know?

"A. He was working with the other men there.

"Q. Patrick McGovern worked around for the other people?

"A. Yes, he had to earn money around with other people.

"Q. That is to say, he was a perfectly able-bodied man, and worked outside?

"A. He worked on his own farm, he kept his own farm.

"Q. And did other work besides?

"A. Yes, he had to do it?

"Q. And he did it?

"A. Yes.

Re-direct examination.

"By MR. DEMMING:

"Q. By saying that he had to do it, do you mean that he could not make enough off his own farm, that he had to work for other people, too?

"A. Yes, sir.

"Q. You say there were five other children over there on the farm with them?

"A. Yes.

"Q. How old were they?

"A. One was about twenty-seven, I suppose.

"Q. Twenty-seven?

"A. Yes.

"Q. That is one older than Peter?

"A. Yes.

"Q. Where was he working?

"A. He was working around near home.

"Q. He was working around home?

"A. Yes.

"Q. How old was the next one?

"A. The next two were here.

"Q. That is Peter and Bridget?

"A. Yes.

"Q. How old is the next one under that?

"A. I judge about fourteen years now.

"Q. About thirteen?

"A. About thirteen or fourteen.
"Q. Was that a boy?
"A. Yes, that was a boy.
"Q. Where was he?
"A. At home.
"Q. At home?
"A. Yes.
"Q. Did he go to school, or work or what?
"A. Yes, he went to school.
"Q. How old was the next one?
"A. I could not say.
"Q. Younger than that one yet?
"A. Yes, three younger.
"Q. Do you know whether that was all? Is that all?
"A. Yes.
"Q. Two younger than Bridget at home?
"A. Four younger.
"Q. One, you say, was thirteen or fourteen?
"A. Yes.
"Q. Thirteen or fourteen?
"A. Yes.
"Q. One younger than that?
"A. Yes.
"Q. Was there one still younger than that?
"A. Yes, one still younger.
"Q. How old was the youngest one?
"A. About four years old.
"Q. About four years?
"A. Between four and five years old.
"Q. Then there was one between that boy, who was thirteen or fourteen, was there?
"A. Yes.
"Q. Was that a boy or a girl?
"A. A boy. They are all boys, except Bridget.
"Q. Are they all boys with the exception of Bridget here?
"A. Yes.
"Q. Do you know anything about how much Peter earned over here?
"A. No.

"Q. You did not know that?
"A. No, sir.

Re-cross-examination.

"By MR MASON:
"Q. In December of 1912, Patrick McGovern and Mrs. McGovern were living on the farm, were they?
"A. Yes.
"Q. They had never been to America, so far as you know?
"A. Not that I know."

This testimony is supported by that of John McGovern (Record pp 21-25).

The statement of claim fails to allege that the parents for whose benefit the suit was brought were *dependent* upon the deceased employee, or at the time of his death were receiving any support or maintenance from him.

The proofs disclose that the non-resident alien parents were not only not dependent upon him, but, on the contrary, were living upon their own farm in Ireland, and that both parents, and four other children living with them at home, were able to work, and were working for their own maintenance and support.

In view of the record evidence showing that the parents for whom the suit was brought were not actually *dependent* upon their deceased son for their maintenance and support, the mere fact that during the six months prior to his death Peter McGovern sent to his parents a sum approximating ten dollars per month, is not sufficient evidence to bring their claim within the contemplation of this section of the statute.

The word "dependent" was used advisedly by Congress to limit the recovery to those who relied upon the employee of an interstate carrier for their support and maintenance, and was never intended to bring within the

protection of the statute those relatives of a deceased employee who were physically capable of maintaining and supporting themselves, and were actually doing so prior to his death, even though they might have been receiving from him gratuities during his lifetime.

The material fact to qualify relatives of a deceased employee as parties entitled to recover is the fact of *dependency*, and where proof of that fact is wanting, or where, as in this case, the proof discloses not dependence, but *independence*, the necessary qualifying evidence to establish a right of recovery is wanting.

Under the record the defendant was justified in its contention that, as there was no person shown to be within the class specified by section 1 of the statute as those for whom a suit might be brought by the administratrix, the plaintiff failed to establish a cause of action and the defendant was entitled to a verdict in its favor.

Michigan Central R. R. Co. v. Vreeland, 227 U. S., 59. Vol. 33, Supreme Court Repr., 192.

MR. JUSTICE LURTON (pp. 195, 196):

> "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decendent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives *dependent* upon the *decedent*. It is therefore a liability for the pecuniary damage resulting to them, and for that only."
> * * *
>
> "The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings."

American R. R. Co. v. Didricksen, *227* U.S., 145; 33 Supreme Ct. Repr., *224.*

MR. JUSTICE LURTON (pp. 225-6):

"The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained. The Court below went beyond this limitation by charging the jury that they might, in estimating the damages, 'take into consideration the fact that they are the father and mother of deceased, and the fact that they are deprived of his society and any care and consideration he might take of them or have for them during his life.' (5 Porto Rico Fed. Rep., 408.)

"The loss of the society or companionship of a son is a deprivation not to be measured by any money standard. It is not a pecuniary loss under such a statute as this.

"Laying out of consideration the indefiniteness of the term 'care and consideration,' as elements in addition to the loss and damage of such pecuniary assistance as the parents of the decedent might have reasonably anticipated from their son, it is enough for the purpose of this case to say that there was no allegation of any such loss, nor any evidence relating to the subject, or from which its pecuniary value might have been estimated."

Gulf &c. Railway Co. v McGinnis, *228* U. S., *173*; 33 Supreme Ct. Repr., 426.

MR. JUSTICE LURTON (p. 427):

"In a series of cases lately decided by this Court,

> the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss."

The argument for the plaintiff in error throughout the paper book of counsel and the argument heretofore presented for the defendant in error have been made as if this case were properly before this Court by the direct writ of error which brought it here.

The defendant in error is in no sense desirous of making avail of a jurisdictional argument if this Court is of opinion that it can properly consider the merits of this controversy.

The questions which have been argued in the paper books of counsel are at the present time undisposed of by any decision of this Court, and for the benefit of all litigants as well as for the guidance of the courts below it is desirable that they may be disposed of by this Court at the earliest possible time.

The defendant in error, however, submits to the Court the following authorities merely as evidence that the question of jurisdiction has been considered, and that the defendant in error is by no means so confident, as the plaintiff in error appears to be, that the direct writ of error was well taken.

The case of **Anthony Farrugia v Philadelphia & Reading Railway Co.**, 34 Supreme Court Rep., 591, is so nearly identical with the case at bar, insofar as the jurisdictional question there involved appears, that counsel for the defendant in error here, who was also counsel in that case, feels obliged to call this Court's attention to it. It was there said by Mr. Justice Van Devanter:

"Although counsel have presented the case as if it were properly here, it is manifest that it is not. The clause in section 238 of the Judicial Code providing for a direct writ of error 'in any case in which the jurisdiction of the Court is in issue' refers, as we have repeatedly held, to cases in which the power of the Court, as a Federal Court, to hear and determine the cause is in controversy. Fore River Shipbuilding Co. v. Hagg, 219 U. S., 175, 178; United States v. Congress Construction Co., 222 U. S., 199; Darnell v. Illinois Central Railroad Co., 225 U. S., 243. No such issue is here disclosed. The power of the Court, as a Federal Court, to hear and determine the case was not questioned. Nor did the Court hold that it was without jurisdiction in that sense. On the contrary, it proceeded to a hearing and decided that the plaintiff could not recover under the Federal Act, because one element of his asserted cause of action was without any evidence to sustain it."

In the case at bar it was decided that the plaintiff could not recover because one element of the asserted cause of action was without evidence to sustain it, to wit: The survival of dependent relatives within the class contemplated by the Act of Congress as persons for whom such a suit might be brought.

The action could have been brought in a State Court, and the result in a State Court upon similar evidence must have been the same, for the reason that section 1 of the statute, if properly interpreted, denies the right of recovery to non-resident alien relatives.

The confidence with which counsel for the plaintiff in error relies upon paragraph 6 of section 5 of the Act of Congress of March 3, 1891 (26 Stat. at Large, 826, chap. 517, U. S. Comp. Stat., 1901, p. 488) (Judicial Code, section 238), to justify the direct writ of error, upon the theory that the validity or construction of a

treaty is drawn in question by the record in this case, fails to give due weight to the decisions of this Court, referred to below.

The right which it is claimed is secured to the plaintiff by the treaties of the United States with Great Britain and Ireland and with the Kingdom of Italy is not asserted by the plaintiff in the pleadings, and nowhere does such claim appear in the record of this case, except insofar as it is referred to in the opinion of the learned trial judge granting a new trial after the first trial of this cause. The record of the *second* trial contains no claim of such a right.

This Court has held that the fact that such a right does arise by virtue of a treaty must appear from the plaintiff's own statement of claim.

Colorado Central Mining Co. v Turk, 150 U. S., 138;
Muse v Arlington Hotel Co., 168 U. S., 430;
Filhiol v Maurice, 185 U. S., 108;
Sloan v United States, 193 U. S., 614.

Mr. Justice Peckham (p. 620):

"In Muse v. Arlington Hotel Co. it was held that some right, title, privilege or immunity dependent upon a treaty must be so set up or claimed as to require the Circuit Court to pass upon the question of the validity or construction of the treaty in disposing of the rights asserted. In order to come within the Act of 1891 the treaty must be directly involved, and upon its construction the rights of the parties must rest. Within these cases it cannot be said that the construction of any treaty is drawn in question herein when the rights of neither party are necessarily dependent upon that which may be given the statute of 1882, and when the construction of that statute is independent of that which may be given any of the treaties mentioned, although weight may be given to the treaties in determining the question of the construction of the statute."

It is submitted that there is no treaty right involved in the disposition made of this case by the learned trial Judge of the District Court, but merely a determination of the rights of the parties under the provisions of the Act of Congress known as the Federal Employers' Liability Act, which was passed subsequent to all of the treaties referred to in the paper book for the plaintiff in error, which were in force and effect at the time of the death of the plaintiff's intestate.

If, therefore, any of the treaties, to which reference has been made, granted a right to non-resident aliens prior to the passage of this statute this right became divested by the passage of the Act of Congress, if it be interpreted as contended for by the defendant in error. It is well settled that an Act of Congress may supersede a prior treaty:

Thomas v Gay, 169 U. S., 264;
Stephens v Cherokee Nation, 174 U. S., 445;
Sanchez v United States, 216 U. S., 167.

Wherever an Act of Congress is inconsistent with the treaty it must prevail, and be enforced despite any provision in the treaty:

Hijo v United States, 194 U. S., 315.

It would seem, therefore, that as there was no treaty in existence at the time the alleged cause of action arose, the terms of which were drawn into consideration by the decision of the District Court, and further, that no claim arising under any treaty whatsoever is asserted in the plaintiff's statement of claim filed in this cause, there is no just ground for the contention made by the plaintiff in error that section 238 of the Judicial Code may be invoked to support the direct writ of error in this cause.

As was said by this Court in *Farrugia v. Railway Co., supra,* "The jurisdiction of the District Court was not in

issue upon this record," and the Court below heard and determined the case upon its merits and denied recovery because an essential element of the asserted cause of action was found to be wanting.

The foregoing argument is not presented to support a motion to dismiss, because no such motion has been filed by the defendant in error in this case, but is presented solely because of the language of the opinion of Mr. Justice Van Devanter in **Farrugia v Railway Co.,** *supra*, to the effect that "counsel have presented the case as if it were properly here, it is manifest that it is not."

It is respectfully submitted that the action of the learned trial judge of the Court below in directing a verdict for the defendant was the proper disposition to be made of the case presented by the record before him, and it is therefore submitted that the judgment of the District Court of the United States for the Eastern District of Pennsylvania in favor of the defendant in error should be affirmed.

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Charles Heebner,
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